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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center
Petitioner,

v.

HEATH ALLEN WILKINS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

Questions Presented for Review

I.

Whether the trial court accepting a waiver of counsel in a criminal proceeding must examine the totality of the circumstances to determine if the waiver is knowingly and intelligently made.

II.

Whether the trial court accepting a guilty plea must examine the totality of the circumstances to determine if the plea is knowingly and intelligently made.

Table of Contents

Questions Presented for Review i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 2

Constitutional and Statutory Provisions Involved . . . 2

Statement of the Case 4

Argument 18

I. The court below decided a question of constitutional law in a way that conflicts with this Court's decision in Faretta v. California, 422 U.S. 806 (1975), and decisions of other United States Courts of Appeals, in that the court below held that the determination of whether a waiver of counsel is valid requires the procedural exactitude delineated in Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality), rather than examining the totality of the circumstances 18

II. The court below decided a question of constitutional law in a way that conflicts with this Court's decisions in McCarthy v. United States, 394 U.S. 459 (1969) and United States v. Broce, 488 U.S. 563

(1989), in that the court below held that the determination of a guilty plea's validity requires the procedural exactitude delineated in Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality), rather than examining the totality of the circumstances 25

Conclusion 30

Appendix . . . . . SEPARATE VOLUMES

Table of Authorities

Constitutional Provisions

U.S. Const. amend. VI 2

U.S. Const. amend. XIV 2

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 . . . . . 2-3, 17

Mo. Rev. Stat. § 211.071 (1986) 4

Mo. Rev. Stat. § 565.020 (1986) 27 n.8

Mo. Rev. Stat. § 565.035 (1986) 16

Court Rules

Fed. R. Crim. P. 11 . . . . . 26, 27, 28, 29

Mo. S.Ct. R. 24.02 (1986) 26, 28, 29

Mo. S.Ct. R. 24.035 (1986) 16

Judicial Decisions

Arnold v. United States, 414 F.2d 1056 (9th Cir. 1969), cert. denied, 396 U.S. 1021 (1970) 24

Brady v. United States, 397 U.S. 742 (1970) 27, 27-28

Briscoe v. State, 606 A.2d 103 (Del. 1992) 24

Butler v. McKellar, 494 U.S. 407 (1990) 25

Caspari v. Bohlen, 510 U.S. 383 (1994) 27 n.9

Faretta v. California, 422 U.S. 806 (1975) 18, 20, 21, 22, 23

Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986) 22 n.7, 23

Griffin v. State, 684 S.W.2d 425 (Mo. App. 1984) 26

Johnson v. Zerbst, 304 U.S. 458 (1938) 22, 28

LaPlante v. Wolff, 505 F.2d 780 (8th Cir. 1974), cert. denied, 420 U.S. 995 (1975) 24

LaVallee v. Delle Rose, 410 U.S. 690 (1973) . . 21 n.6

Libretti v. United States, 516 U.S. 29 (1995) 27

McCarthy v. United States, 394 U.S. 459 (1969) 26, 28, 29

Patterson v. Illinois, 487 U.S. 285 (1988) 18, 20

Spanbauer v. Burke, 374 F.2d 67 (7th Cir. 1966), cert. denied, 389 U.S. 861 (1967) 22

Stanford v. Kentucky, 492 U.S. 361 (1989) 16

State v. Crisafi, 608 A.2d 317, 324 (N.J. 1992) . . . 24

State v. Merino, 915 P.2d 672 (Haw. 1996) . . . 22 n.7

State v. Strain, 585 So.2d 540 (La. 1991) 23

State v. Taylor, 929 S.W.2d 209 (Mo. banc 1996), cert. denied, 117 S.Ct. 1088 (1997) 28

State v. Van Sickle, 411 N.W.2d 665 (S.D. 1987) 22

State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987), *cert. granted in part,* Wilkins v. Missouri, 487 U.S. 1233 (1988), *aff'd sub nom.* Stanford v. Kentucky, 492 U.S. 361 (1989) . . 4

Teague v. Lane, 489 U.S. 288 (1989) 25, 27 n.9

Torres v. United States, 140 F.3d 392 (2nd Cir.), pet. for cert. filed (9/8/98) 22 n.7

United States v. Ant, 882 F.2d 1389 (9th Cir. 1989) 22 n.7

United States v. Bailey, 675 F.2d 1292 (D.C. Cir.), cert. denied, 459 U.S. 853 (1982) 23

United States v. Broce, 488 U.S. 563 (1989) 26, 27, 29

United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987) 22 n.7, 23

United States v. Campbell, 874 F.2d 838 (1st Cir. 1989) 22, 22 n.7

United States v. Gallop, 838 F.2d 105 (4th Cir.), cert. denied, 487 U.S. 1211 (1988) 22 n.7, 23

United States v. Hafen, 726 F.2d 21 (1st Cir.), cert. denied, 466 U.S. 962 (1984) 22

United States v. McDowell, 814 F.2d 245 (6th Cir.), cert. denied, 484 U.S. 980 (1987) 22 n.7, 23

United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989) 22 n.7, 23

United States v. Taylor, 113 F.3d 1136 (10th Cir. 1997) 24

United States v. Welty, 674 F.2d 185 (3rd Cir. 1982) 24

Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality) 18, 19, 20, 22, 23, 24, 25, 29

Wayne v. State, 495 S.E.2d 34 (Ga. 1998) 23

Wilkins v. Bowersox, 145 F.3d 1006 (8th Cir. 1998) 1

Wilkins v. Bowersox, 933 F.Supp. 1496 (W.D. Mo. 1996) 1-2

Wilkins v. Bowersox, 886 F.Supp. 1503 (W.D. Mo. 1995) 2

Wilkins v. State, 802 S.W.2d 491 (Mo. banc), cert. denied, 502 U.S. 841 (1991) 17

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MICHAEL BOWERSOX,
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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Petitioner, Superintendent Bowersox, prays the Court for its order granting a writ of certiorari to review the judgment of the court below affirming the grant of Respondent Wilkins' application for writ of habeas corpus.

Opinions Below

The June 8, 1998 Panel Opinion of the United States Court of Appeals for the Eighth Circuit, for which petitioner seeks this Court's review, is reported at 145 F.3d 1006 (8th Cir. 1998), and published in the Appendix at App. 1. The May 15, 1996 Order of the District Court granting the petition for writ of habeas

corpus is reported at 933 F.Supp. 1496 (W.D. Mo. 1996) and published at App. 26. The District Court's May 16, 1995 Order granting the petition for writ of habeas corpus, before remand by the court below (App. 110), is reported at 886 F.Supp. 1503 (W.D. Mo. 1995) and published at App. 113.

Jurisdictional Statement

The Opinion of the United States Court of Appeals for the Eighth Circuit was issued on June 8, 1998 (App. 1). The court below denied the petition for rehearing with suggestions for rehearing *en banc* on July 13, 1998 (App. 103). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The sixth amendment to the Constitution of the United States provides, in pertinent part, that: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Section 1 of the fourteenth amendment to the Constitution of the United States provides, in pertinent part, that: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (a) of 28 U.S.C. § 2254 provides that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the

ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Statement of the Case

On July 27, 1985, Wilkins stabbed to death a twenty-six-year-old mother and convenience store co-owner during the course of a robbery (App. 176, reported at State v. Wilkins, 736 S.W.2d 409, 410 (Mo. banc 1987), *cert. granted in part,* Wilkins v. Missouri, 487 U.S. 1233 (1988), *aff'd sub nom.* Stanford v. Kentucky, 492 U.S. 361 (1989)).

Respondent was arrested for Nancy Allen's murder on August 10, 1985 (App. 180). One month before his seventeenth birthday, the juvenile court certified respondent to stand trial as an adult under Mo. Rev. Stat. § 211.071 (1986) (State's Exh. B[1], pp. 4-5). On October 17, 1985, respondent was arraigned on charges of Murder in the First Degree, Unlawful Use of a Weapon, and Armed Criminal Action (App. 181). Respondent's court-appointed counsel entered pleas of not guilty and not guilty by reason of mental disease or defect excluding responsibility (App. 181), and filed a motion for mental examination (App. 181). The trial court entered the pleas and ordered that the Department of Mental Health examine respondent (App. 181).

On November 27, 1985, Dr. Steven A. Mandracchia, Ph.D., a clinical psychologist, conducted a clinical examination, personal interview, psychological testing, and mental status examination of respondent (App. 226). Dr. Mandracchia also relied upon the following information: (1) "Referral data from the Seventh Judicial Circuit Court, Clay County, Missouri";

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[1]Citation to exhibits are to those exhibits before the district court.

(2) "Clay County Sheriff's Department Investigation Report and related reports . . . pertaining to the alleged offenses"; (3) "Evaluation and treatment records from: Crittenton Center, Kansas City, Missouri; Tri-County Community Mental Health Center, North Kansas City, Missouri; Butterfield Youth Services, Inc., Marshall, Missouri; and, Western Missouri Mental Health Center, Kansas City, Missouri"; (4) "Evaluation and Progress Reports from the State of Missouri, Division of Family Services and the Clay County, Missouri Juvenile Court"; and (5) "Psychiatric Social Work Report completed at Western Missouri Mental Health Center specifically for this evaluation." (State's Exh. M-1, p. 1).

Dr. Mandracchia concluded that "the results of this examination indicate that the defendant is an individual of average intellectual capacity who demonstrates no gross deficits in terms of his overall mental status and no symptoms of mental disease or defect within the meaning of Chapter 552, R.S.Mo." (State's Exh. M-1, p. 4). Dr. Mandracchia reported that respondent "possesses sufficient capacity to understand the proceedings against him, meaningfully assist legal counsel, and cooperate with the Court in his own best interest." (State's Exh. M-1, pp. 4-5). His opinion did not change after learning that respondent intended to discharge his attorney, plead guilty, and seek a sentence of death (App. 229).

Respondent's experts, William Logan, M.D. and Melvin Berg, Ph.D., also evaluated his competency (App. 234). Dr. Logan interviewed respondent for five hours, focusing on respondent's history, current mental state, and state of mind at the time of the offense (App. 234). Background material reviewed by Dr. Logan included the following: (1) evaluations of the Tri-County

Mental Health Center and Western Missouri Mental Health Center during August and September 1979; (2) records from the Butterfield Youth Services including the admissions summary, reports to the juvenile court, treatment reviews, progress reports, psychological testing, school records, psychiatric evaluations, and discharge summary covering the period from 2/1/80 until 5/20/83; (3) reports from the Crittenton Center in Kansas City, Missouri, including the discharge summary, psychiatric evaluation, psychological testing, and school records covering a period from 5/28/83 until 11/17/83; (4) the psychiatric evaluation of the Western Missouri Mental Health Center dated 12/16/85; and (5) investigation reports on the current offense (Wilkins' Exh. 14-A, p. 2).

On the issue of competence to stand trial, Dr. Logan reported:

> The patient appears to have an accurate understanding of the charges against him, the potential penalty if convicted, possible pleas, and the role of the various officers and procedures of the court. Likewise he has sufficient memory and verbal ability to relate the details of his case to his attorney and assist him in preparing an adequate defense.
>
> While the patient's cognitive capacity is intact, his actions in the case are governed more by his emotions. Prominent in this regard is his stated wish to die and determination to plead guilty to speedily effect this end. Since this is the case, he does not see his attorney as

working in his own best interest. He is still insistent on a personal freedom, namely a freedom to die. He explains he fears torture more than death. He continues, death is no loss to him and that he prefers death to being locked up. He maintains he will not go to prison or a mental institution. He has thought of ending his life as he has "nothing to look out on." He believes he is a liability to his girl friend, his only connection, and his death would actually aid her in moving on with her own life. He labors under the assumption she is charged with a lesser crime and will receive a shorter penalty than himself. He expresses guilt at his own destructiveness and that he has hurt his girl friend, the victim, the victim's family, and his friends. He has only limited appreciation of the appeal process or society's interest in his fate viewing this as only another intrusion and limitation of his own freedom.

In conclusion, while the patient has an adequate factual understanding of his situation and the ability to cooperate with his attorney, emotional issues may prevent him from acting in his own best interests. The weighing of these two factors, the cognitive versus the emotional, is the essence of the decision before the court.

(Wilkins' Exh. 14-A, p. 14).

Dr. Berg conducted psychological testing on March 22, 1986 (App. 234). Dr. Berg's "Psychological Test Report" included the following regarding "legal implications":

> Despite the massive impairments in this youngster's development which have contributed toward his inadequate impulse controls, vulnerability to muddled thought, intense rage, and experience of others as not being real, he cannot be regarded as suffering from a psychotic condition which grossly impairs his attunement with reality. Certainly it is possible that in the heat of intense feeling states his capacity to think clearly, control his impulses, and evaluate reality can become temporarily weakened.
>
> With regard to his ability to aid in his own defense, he possesses adequate cognitive skills to be able to collaborate with an attorney and understand the legal circumstances facing him. His reported disinterest in waging a legal defense may result from his hopeless view of his life which already feels barren and worthless, so the prospect of living in prison without the stimuli to distract him from his inner torment may seem unbearable.

(Wilkins' Exh. 15-A, pp. 6-7).

On April 16, 1986, the trial court found respondent competent to stand trial (App. 257).[2] Respondent then moved to proceed pro se (App. 257). The court addressed that motion with respondent:

> The Court: Everyone has a right to represent themselves. Do you understand the constitution also gives you a right to have an attorney?
>
> Defendant: Yes, I do.
>
> The Court: And the court has supplied that for you by appointing the public defender office in this case.
>
> Defendant: That is correct.
>
> The Court: And there are many, of course, you are not skilled in the law. And what is your age?
>
> Defendant: Seventeen, your honor.
>
> The Court: And the extent of your education?

---

[2]Respondent conceded the issue of competence to waive counsel and plead guilty when he abandoned his claim before the district court that he was incompetent to proceed at the time of his guilty plea and sentencing hearing (Wilkins' Revised Motion To Dismiss Certain Claims In The Amended Petition -- Joint Appendix (J.A.) before the court below, pp. 1137-1138; Order of the district court granting motion to dismiss certain claims -- App. 104).

Defendant: Ninth grade, your honor.

The Court: So, you are really not familiar at all with legal proceedings, are you?

Defendant: That is correct.

The Court: During the course of making decisions you would not have the background of legal knowledge or experience that a lawyer would possess, isn't that correct?

Defendant: Yes, your honor. I'm not, I don't, okay, that is correct.

* * * * *

The Court: Getting back to what I was saying before, you do understand, Mr. Wilkins, that you have a right to hire your own attorney?

Defendant: Yes, your honor, I do.

The Court: And that would be an attorney of your own choice and selection.

And, again, since you have been unable to employ one the court has appointed one for you. I presume that you are still in a position not to employ your own attorney, is that correct?

Defendant: That is correct.

The Court: But, you do understand that an attorney, of course you also understand that you're entitled to have a trial by jury in this case?

Defendant: Yes, your honor.

* * * * *

Mr. Duchardt [defense counsel]: Heath, have I explained to you basically the types of things that I would do if I were your attorney in attempting to try this case to attempt to reach the type of result that Judge McFarland was talking about earlier, in other words trying the case in an attempt to win it, for lack of a better term. Did I explain all of that to you?

Defendant: Yes.

Mr. Duchardt: And is it a fair statement that you said that's just not what you want a lawyer to do for you?

Defendant: Yes, that's unacceptable, yes.

The Court: How long have you thought about this decision to discharge Mr. Duchardt as your attorney and to conduct your own defense?

Defendant: Since----

Mr. Duchardt: January.

Defendant: ----January. And the last, my original court hearing when my evaluation from Tri-County when I came in here, I was----

Mr. Duchardt: Western Missouri.

Defendant: ----Yes, Western Missouri, I mean.

The Court: I must be rather candid with you, you understand that if you, if you do, as I understand what you've indicated here that you want to do, you might very well enter a plea of guilty and ask for the death penalty.

Now, do you understand fully that if you do that, that decision then would be up to the court as to whether or not you'd receive the death penalty or not?

* * * * *

The Court: Mr. Duchardt, have you talked with Mr. Wilkins at length about this situation?

Defendant: Yes, sir.

Mr. Duchardt: How many times would you say, Heath, that you and I have talked about this, three or four times anyway over at the jail.

And a couple of those conversations were at least two hours long, I think.

Judge, I've tried to describe for Mr. Wilkins all of the different possibilities and all of the options that----

Defendant: Yes, sir, quite explicit.

Mr. Duchardt: ----are, his words are well taken, quite explicit. And I've attempted to go through every potential option that I can see in our ability to defend this case and attempt to present a valid defense on his behalf.

And also I've attempted to describe for him the scenario should he wish to go ahead and proceed as he is. And that's what got us to our specific conversations about the fact that, at least in my opinion, a lawyer would be duty bound to do things just the opposite of what Mr. Wilkins would wish be done should he continue on this path of trying to seek the maximum punishment for himself.

Defendant: Yeah, I'd like to make your honor aware that this isn't, you know, just a spur of the moment idea or anything along that line.

* * * * *

(App. 258-259, 263, 268-271).

A week later respondent renewed his desire to proceed pro se. The court again discussed with

respondent his right to have counsel appointed, explained the range of punishment on the charge of first-degree murder, and explained the bifurcated nature of a first-degree murder proceeding (App. 282-284). The trial court then advised respondent of the following:

> The Court: And legal research. And they [lawyers] could help you, of course, in the conduct of your trial and at all other pretrial proceedings.
>
> And in regard to the conduct of the trial if you had one, of course, they could obviously do a better job than you in conducting the voir dire examination of the jury panel, in selecting the jury, in making opening statement, in examining and cross-examining all witnesses, in making objections and preserving the record for appeal, making all proper motions, in the preparation of instructions that are submitted to the court for submission to the jury, all arguments to the jury and to the court.
>
> And in the event you are found guilty they would assist you in your right of appeal. And the first step of that would be, probably, a motion for new trial.
>
> Now, you don't have any legal experience. You don't have any legal training. And the court encourages you to change your mind and to accept the representation, that is the continued representation of the Public Defender

Office. And you do understand all of that?

Defendant: I understand, your Honor.

* * * * *

(App. 284). The court also discussed with respondent what is required to accept a guilty plea, including a factual basis for the plea, and whether there exists witnesses, facts, circumstances, or evidence that would exonerate him or that would cast a reasonable doubt about his guilt. (App. 288-289).

Later that afternoon the court granted the public defender's office leave to withdraw, and ordered the public defender to remain available to consult with respondent throughout the proceeding (App. 297). Respondent asked to plead guilty as charged (App. 299). The court did not automatically accept respondent's pleas. Instead, the court explained the rights that respondent would be waiving and told respondent that the court would permit him to withdraw his guilty pleas until the time that sentence is pronounced (App. 299-301). The court also urged respondent to reconsider his decision to proceed without counsel (App. 301-302), and continued the matter (App. 304).

On May 9, 1986, respondent renewed his pleas of guilty, stating they were not coerced, and then described the circumstances of the offenses (App. 314-320, 330-336). The court reminded respondent of the rights he was waiving by pleading guilty and foregoing a trial -- e.g., to have counsel assist him throughout those proceedings, the presumption of innocence, to confront witnesses, to remain silent, and to appeal

(App. 338-340). The court accepted respondent's guilty plea, finding a factual basis and that "defendant's plea of guilty is made voluntarily and intelligently and with full understanding of the charge and consequences of the plea and with understanding of his rights attending a jury trial and the effect of a plea of guilty on those rights." (App. 351).

At the sentencing hearing on June 27, 1986, the court again discussed with respondent the role a lawyer could play in the penalty phase (States' Exh. A-2, pp. 179-182). The State presented its evidence; respondent presented no mitigating evidence (State's Exh. A-2, pp. 194-289). The court concluded that respondent's decision to seek the death penalty "was made rationally and after due thought and deliberation." (State's Exh. A-2, p. 299). After finding that "[t]he murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery" and that "[t]he murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman," (State's Exh. A-2, p. 300), the court set death as respondent's sentence for first-degree murder (State's Exh. A-2. pp. 300-301).

On mandatory review before the Missouri Supreme Court, Mo. Rev. Stat. § 565.035 (1986), respondent again sought to proceed pro se (App. 177). But the court appointed counsel, received briefs, and heard argument. On September 15, 1987, that court affirmed respondent's sentence and conviction (App. 176). This Court granted certiorari and decided that the Eighth Amendment prohibition against cruel and unusual punishment did not preclude the exercise of capital punishment on an individual who was age

sixteen or seventeen at the time of the offense. Wilkins v. Missouri, 492 U.S. 361 (1989).

Pursuant to Mo. S.Ct. R. 24.035, respondent filed a motion for postconviction relief (State's Exh. G, p. 1). Following respondent's amendment to the motion, the circuit court held an evidentiary hearing (State's Exh. F). Circuit Judge McFarland, who had presided over respondent's pretrial, plea, and sentencing proceedings, denied relief (State's Exh. G, pp. 84-113). The Missouri Supreme Court affirmed that denial (App. 141, reported at Wilkins v. State, 802 S.W.2d 491, 504 (Mo. banc), cert. denied, 502 U.S. 841 (1991)).

On May 8, 1992, respondent filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Missouri (J.A. 13). The district court granted the writ of habeas corpus on May 16, 1995 (App. 114). The State appealed, and the United States Court of Appeals for the Eighth Circuit remanded to the district court for resolution of all issues raised in the first amended petition (App. 110). After vacating its May 16, 1995 order and dismissing a number of grounds upon respondent's motion (App. 104), the district court granted the writ on May 15, 1996 (App. 26). Petitioner again appealed. The court below affirmed the district court's judgment on June 8, 1998 (App. 1). The State's petition for rehearing with suggestions for rehearing *en banc* was denied on July 13, 1998 (App. 103).

Argument

I. The court below decided a question of constitutional law in a way that conflicts with this Court's decision in Faretta v. California, 422 U.S. 806 (1975) and decisions of other United States Courts of Appeals, in that the court below held that the determination of whether a waiver of counsel is valid requires the procedural exactitude delineated in Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality), rather than examining the totality of the circumstances.

The Court should resolve the conflict perpetuating in the lower courts concerning the knowing and intelligent waiver of counsel. Some courts look to the totality of the circumstances to determine if the waiver was knowing and intelligent. Others, as exemplified by the present case, look to see if a checklist of issues were discussed on the record. Review in the present case would allow the Court to resolve the conflict and inform trial courts to review the totality of the circumstances in deciding whether a waiver is knowing and intelligent.

To affirm the district court's grant of habeas corpus relief, the court below applied a standard for waiver of counsel announced in this Court's plurality decision in Von Moltke v. Gillies, 332 U.S. 708 (1948), notwithstanding this Court's more recent description of the standards for a valid waiver in Faretta v. California, 422 U.S. 806, 835 (1975) and Patterson v. Illinois, 487 U.S. 285, 298 (1988). In holding that respondent's waiver of counsel was not valid, the court below stated:

The Supreme Court has explained the requirements for a valid waiver of counsel.

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.
>
> Von Moltke v. Gillies, 332 U.S. 708, 724, 68 S.Ct. 316, 92 L.Ed. 309 (1948) (plurality). To validly waive counsel, a defendant must actually understand all of the relevant considerations; thorough advise from the court alone is not sufficient. . . .

(App. 12).

In relying upon Von Moltke as providing a mechanical formula to determine a valid waiver of counsel, the court below joined the Third and Tenth Circuits in failing to recognize or apply this Court's more recent discussions of the basic requirement that a waiver of counsel be made knowingly and intelligently:

> Although a defendant need not himself have the skill and experience of a lawyer

> in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. [264, 279, 63 S.Ct. 236, 242, 87 L.Ed.2d 268 (1942)].
>
> * * * * *

Faretta, 422 U.S. at 835. That is, the scope of the right to counsel has been defined

> by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.

Patterson, 487 U.S. at 298.

In stark contrast with the court below's reliance on Von Moltke, a review of the totality of the circumstances reveals respondent's waiver was knowing and intelligent. Having found respondent competent to stand trial (App. 257), and in light of respondent's insistent refusal to accept counsel's assistance[3], the court's numerous warnings of the perils

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[3]App. 257-258, 261, 268, 277, 285-286, 289-290, 297-298, 316, 318-320, 341.

inherent with self-representation[4], explanation of the range of punishment on the charge of first-degree murder, the nature of the bifurcated proceedings in a murder trial, and matters relating to the acceptance of a guilty plea[5], not allowing respondent to represent himself would have forced counsel upon an unwilling defendant. See Faretta, 422 U.S. at 820.[6] Undoubtedly the trial court protected respondent's right to counsel with knowledge of the perils of self-representation, describing what counsel could do in representing respondent, and by attempting to persuade him that self-representation was not only a bad idea but of the dire consequences under the circumstances. As illustrated by the present case, the choice between the conflicting standards can be outcome determinative.

The First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Eleventh, and District of Columbia Circuits, in

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[4]App. 259, 265-267, 272, 281, 283-284, 289, 297, 310-311, 314-316, 318.

[5]App. 263-264, 282-283, 287-289, 299-302, 307-309, 317, 321-324, 327-328, 338-341.

[6]According to the court below, "the state court made no findings of fact relevant to the waiver of counsel." (App. 13). This conclusion ignores the principle that when the trial court holds a hearing and reaches the merits of a federal constitutional claim, the federal court must assume that the state court found the facts necessary to support its decision unless there is some indication that the state court applied an incorrect legal standard in resolving the claim. LaVallee v. Delle Rose, 410 U.S. 690, 692-695 (1973).

post-Faretta decisions, have not applied the Von Moltke inquiry.[7]

Some federal courts renounce the Von Moltke approach. For example, in Campbell, 874 F.2d at 845, the First Circuit expressly rejected the argument that Von Moltke and Johnson v. Zerbst, 304 U.S. 458, 465 (1938) required that "'the district court must issue a particular warning or make specific findings of fact before it allows the defendant to proceed pro se.'" (quoting United States v. Hafen, 726 F.2d 21, 25 (1st Cir.), cert. denied, 466 U.S. 962 (1984)); see also Spanbauer v. Burke, 374 F.2d 67, 72-74 (7th Cir. 1966), cert. denied, 389 U.S. 861 (1967) (tracing the application of Von Moltke in the federal courts before Faretta, and concluding that in almost every instance the courts have applied the substance of the Von Moltke guidelines rather than an exacting formula). Some state supreme courts also have expressly decided not to apply Von Moltke literally. See, e.g.,

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[7]United States v. Campbell, 874 F.2d 838, 845-846 (1st Cir. 1989); Torres v. United States, 140 F.3d 392, 401 (2nd Cir.), pet. for cert. filed (9/8/98); United States v. Gallop, 838 F.2d 105, 110 (4th Cir.), cert. denied, 487 U.S. 1211 (1988); Richardson v. Lucas, 741 F.2d 753, 757 (5th Cir. 1984); United States v. McDowell, 814 F.2d 245, 249 (6th Cir.), cert. denied, 484 U.S. 980 (1987); United States v. Moya-Gomez, 860 F.2d 706, 732-733 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989); United States v. Ant, 882 F.2d 1389, 1394 (9th Cir. 1989); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986); United States v. Brown, 823 F.2d 591, 599 (D.C. Cir. 1987); accord State v. Merino, 915 P.2d 672, 696-697 (Haw. 1996); State v. Van Sickle, 411 N.W.2d 665, 667 (S.D. 1987).

Wayne v. State, 495 S.E.2d 34, 38 (Ga. 1998); State v. Strain, 585 So.2d 540, 542 (La. 1991).

Four other circuit courts not applying Von Moltke have concluded that Faretta did not establish detailed guidelines concerning what tests or lines of inquiry a trial judge is required to conduct to determine whether the defendant's decision to waive counsel was knowing and intelligent. Gallop, 838 F.2d at 109; McDowell, 814 F.2d at 249; Moya-Gomez, 860 F.2d at 732; Fitzpatrick, 800 F.2d at 1065; cf. Brown, 823 F.2d at 599 ("Neither case law nor common sense supports the position that a trial court must advise a defendant of each and every difficulty he might encounter in a particular case."). The District of Columbia and Sixth Circuits, to facilitate review, have exercised their supervisory power pertaining to the record that district courts should make in determining the validity of a waiver of counsel in federal prosecutions. McDowell, 814 F.2d at 249-250; United States v. Bailey, 675 F.2d 1292, 1300 (D.C. Cir.), cert. denied, 459 U.S. 853 (1982).

The rationale behind these decisions is the problems inherent with a literal application of Von Moltke:

> The Von Moltke case suggests a standard of perfection. Applied literally, there could never be a competent waiver of the assistance of counsel inasmuch as few, if any, judges, and perhaps not even lawyers, could deliver an impromptu dissertation in every case covering all possible included offenses, the range of allowable punishments, all possible defenses to the charges and

> circumstances in mitigation thereof. We view the language of the Von Moltke opinion as directory to the trial courts, emphasizing the importance of careful inquiry before a waiver of the assistance of counsel is accepted. It does not require a hypothetical lecture on criminal law for the edification of the defendant. It is sufficient if basic rights appearing from the then record before the court are discussed. . . .

Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969), cert. denied, 396 U.S. 1021 (1970) (internal citations omitted); accord LaPlante v. Wolff, 505 F.2d 780, 782 (8th Cir. 1974), cert. denied, 420 U.S. 995 (1975) (sharing the concern that the trial court, in order to acquire information as to possible defenses "may infringe on the accused's constitutional right against self-incrimination.").

Rejecting the course take by nine circuits, in this case the Eighth Circuit followed the Third and Tenth in invoking the rigid formula of Von Moltke. United States v. Welty, 674 F.2d 185, 188-189 (3rd Cir. 1982) (but disavowing the requirement of "a detailed listing of advice similar to that mandated for guilty plea proceedings conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure . . . ."); United States v. Taylor, 113 F.3d 1136, 1141 (10th Cir. 1997). At least two state supreme courts have also applied a literal interpretation of Von Moltke. Briscoe v. State, 606 A.2d 103, 108 (Del. 1992); State v. Crisafi, 608 A.2d 317, 324 (N.J. 1992). The courts holding that this Court in Von Moltke set forth the requirements for

determining the validity of a waiver of counsel have failed to consider its standard pragmatically.

Relying upon language in Von Moltke that a judge's inquiry regarding waiver of counsel must be comprehensive and probing, the court below rejected petitioner's assertion that a literal application of the Von Moltke litany constituted a new rule of constitutional law of which retroactive application was barred under Teague v. Lane, 489 U.S. 288 (1989) (App. 15 n.5). As the above discussion demonstrates, the Eighth Circuit's application of Von Moltke runs afoul of Teague. See Butler v. McKellar, 494 U.S. 407, 415 (1990).

The Court should intervene to resolve this conflict among the federal courts of appeals. In some jurisdictions, the waiver of counsel is reviewed for its knowing and voluntary nature by reviewing all the circumstances. In other jurisdictions, the waiver is reviewed against a rigid checklist. The former approach is superior not because it has been adopted in more circuits, but because it should provide more accurate resolution of the question whether the defendant is aware of the dangers and disadvantages of self-representation. Under the totality of the circumstances, respondent's waiver of counsel was valid. The Court should review the issue and resolve the conflict so that trial and appellate courts can properly decide and review the knowing and intelligent waiver of counsel.

II. The court below decided a question of constitutional law in a way that conflicts with this Court's decisions in McCarthy v. United States, 394 U.S. 459 (1969) and United States v. Broce, 488 U.S. 563 (1989), in that the court below held that the

determination of a guilty plea's validity requires the procedural exactitude delineated in Von Moltke v. Gillies, 332 U.S. 708 (1948) (plurality), rather than examining the totality of the circumstances.

The court below's decision requires courts accepting guilty pleas to complete a checklist of issues to discuss with a defendant. Items on the checklist include a discussion about potential defenses, a requirement rejected by this Court in United States v. Broce, 488 U.S. 563, 573 (1989), and lesser included offenses, a requirement rejected in McCarthy v. United States, 394 U.S. 459, 467 n.20 (1969). The decision of the court below involves an important federal question that was decided in a way that conflicts with relevant decisions of this Court.

A defendant must enter his guilty plea knowingly, intelligently, and voluntarily. This basic requirement does not, however, include corollary requirements forcing the trial court to discuss defenses, real or hypothetical, to the charge. If the federal constitution does contain such a requirement, then it is not manifested in Fed. R. Crim. P. 11 or, at least, Missouri's counterpart to that Rule, Mo. S.Ct. R. 24.02. See Griffin v. State, 684 S.W.2d 425, 427 (Mo. App. 1984). The sufficiency of Federal Rule 11 and its state counterpart is a compelling reason to review this case. Given the role of guilty pleas in the criminal justice system, courts accepting guilty pleas need to know what must be done to assure that such a plea is knowing and intelligent.

The court below found that "Wilkins' guilty plea and waiver of presenting mitigating evidence were not valid for essentially the same reasons that lead us to

conclude that his waiver of counsel was not valid." (App. 21). Specifically, the court of appeals found that the state court had not expressly addressed three items on its now-rigid checklist: (1) possible defenses such as diminished capacity; (2) all possible lesser included offenses; and (3) the full range of potential sentences[8] (App. 21-22). The Eighth Circuit's standard for entering a knowing and intelligent guilty plea elevates what is constitutionally mandated to a new, unexplored level.[9]

Without doubt, "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970) (footnote omitted). The Eighth Circuit's rule departs from this Court's holdings. This Court has not held that a "conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty." Broce, 488 U.S. at 573; see also Libretti v. United States, 516 U.S. 29, 49-50 (1995) (declining to expand the requisite colloquy under Fed. R. Crim. P. 11 to include advice that a guilty plea waives the right to a jury determination of forfeitability under Rule 31(e)); cf. Brady, 397 U.S. at 757 ("A defendant is not entitled to withdraw his plea merely because he discovers long

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[8]Under Missouri law, the only available sentences upon a conviction for first-degree murder is death or life without eligibility of probation or parole. Mo. Rev. Stat. § 565.020.2.

[9]Contrary to Caspari v. Bohlen, 510 U.S. 383, 389 (1994), the court below did not address the Teague nonretroactivity principle raised in the State's Eighth Circuit brief (see App. 20-22; Brief of Appellant, p.30).

after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action.").

Nor has this Court held that a defendant's guilty plea, to constitute "an intentional relinquishment or abandonment of a known right or privilege," Johnson v. Zerbst, 304 U.S. 458, 464 (1938), requires the admonishment of the defendant about lesser included offenses. To the contrary, in the context of considering the required procedure under Rule 11 of the Federal Rules of Criminal Procedure, this Court commented that

> where the charge encompasses lesser included offenses, personally addressing the defendant as to his understanding of the essential elements of the charge to which he pleads guilty would seem a necessary prerequisite to a determination that he understands the meaning of the charge. . . .

McCarthy, 394 U.S. at 467 n.20. Thus for purposes of entering a valid plea under Fed. R. Crim. P. 11, it appears sufficient that a court apprise the defendant of the crime's elements.

Respondent pled guilty under Mo. S.Ct. R. 24.02, a rule designed to ensure a guilty plea is knowing and intelligent. State v. Taylor, 929 S.W.2d 209, 216 (Mo. banc 1996), cert. denied, 117 S.Ct. 1088 (1997). Rule 24.02(b) of the Missouri Supreme Court Rules and Rule 11(c) of the Federal Rules of Criminal Procedure identically provide that

> the court must address the defendant personally in open court, and inform him of, and determine that he understands the following:
>
> 1. The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law . . . .

Mo. S.Ct. R. 24.02(b); see Fed. R. Crim. P. 11(c). Procedures such as Federal Rule 11 have not been held constitutionally-mandated. McCarthy, 394 U.S. at 465. That Rule is but one of many ways a trial court has to ensure a plea is proper. Under the holding of the court below, however, a guilty plea is constitutionally invalid though the defendant is advised of the nature of the charge and consequences of the plea -- absent a demonstrated "apprehension of the nature of the charges, the statutory offenses included with them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter" pursuant to Von Moltke, 332 U.S. at 724.

In light of McCarthy, 394 U.S. at 465, and Broce, 488 U.S. at 573, the court of appeals' decision conflicts with this Court's decisions and renders Fed. R. Crim. P. 11(c) and its state counterpart insufficient to protect a criminal defendant's constitutional rights. The Court should intervene and resolve this area of the law that is now rendered uncertain. The Court should provide guidance for courts that must determine whether a plea of guilty is knowing and intelligent.

Conclusion

WHEREFORE, Superintendent Bowersox prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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Supreme Court, U.S.
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No. 98-_____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center
Petitioner,

v.

HEATH ALLEN WILKINS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
Volume I

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178 pp

Table of Contents

Volume i

Opinion in *Wilkins v. Bowersox*, No. 96-2441 (8th Cir. June 8, 1998) 1

Dispositive Order in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) . . . 26

Judgment in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) 94

Order Denying State's Motion To Preclude Consideration Of Evidence Adduced Before This Court On Petition For Writ Of Habeas Corpus and granting Wilkins' Motion To Expand The Record, in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) 95

Order Denying Rehearing and Rehearing En Banc in *Wilkins v. Bowersox*, No. 96-2441 (8th Cir. July 13, 1998) 103

Order Granting Wilkins' Motion To Set Aside Order Dated May 16, 1995 and Revised Motion To Dismiss Certain Claims in the Amended Petition in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. April 23, 1996) . . 104

Judgment Granting Motion To Remand in *Wilkins v. Delo*, No. 95-2724WMKC (8th Cir. Oct. 3, 1995) 110

Order Denying State's Motion To Alter Or Amend in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo. June 16, 1995) 111

Order Granting Writ of Habeas Corpus in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo. May 16, 1995) 113

Judgment in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo. May 18, 1995) 139

Opinion of the Missouri Supreme Court in *Wilkins v. State*, No. 71936, as reported at 802 S.W.2d 491 (Mo. banc), *cert. denied*, 502 U.S. 841 (1991) 141

Volume II

Opinion of the Missouri Supreme Court in *State v. Wilkins*, No. 68393, as reported at 736 S.W.2d 409 (Mo. banc 1987), *cert. granted in part, Wilkins v. Missouri*, 487 U.S. 1233 (1988), *aff'd sub nom. Stanford v. Kentucky*, 492 U.S. 361 (1989) 176

Transcript Of Proceedings On Plea of Guilty And Sentence Of Death in *State v. Wilkins*, No. CR185-491FX, 492FX, 493FX (Response Exhibit A-2 in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo.)), pp. 1-194 212

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-2441

Heath Allen Wilkins,

Petitioner-Appellee,

vs.

Michael Bowersox,

Respondent-Appellant.

Appeal from the United States District Court for the Western District of Missouri

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Submitted: March 10, 1997

Filed: June 8, 1998

Before McMILLIAN AND HANSEN, Circuit Judges, and MAGNUSON,[1] District Judge.

HANSEN, Circuit Judge.

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[1]The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

The Superintendent of the Potosi Correctional Center in Mineral Point, Missouri, Michael Bowersox (Respondent), appeals from the judgment of the district court[2] granting Health Allen Wilkins' petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1994). In 1986, Wilkins pleaded guilty to first-degree murder and received a death sentence for a Missouri state trial court. The district court granted the writ on multiple grounds, including the court's belief that Wilkins' waiver of counsel, his guilty plea, and his waiver of the right to present mitigating evidence were not entered into knowingly, intelligently, and voluntarily. Wilkins v. Bowersox, 933 F.Supp. 1496 (W.D. Mo. 1996). We affirm.

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[2]The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

I.

From infancy through his teenage years, Wilkins suffered severe physical and emotional abuse at the hands of his mother and other adults in his life. He began abusing drugs as a kindergartner on his way to school. At the age of 10, he became a ward of the state as a result of his involvement in a burglary. A mental health evaluation at that time described Wilkins as a severely depressed boy with homicidal and suicidal tendencies. During the years that followed, he was transferred in and out of mental health facilities. By the age of 16, Wilkins was living on the streets with three other teenagers.

On July 27, 1985, at the age of 16, Wilkins and his three teenaged companions robbed a liquor store and delicatessen in Avondale, Missouri, and committed a murder during the court of the robbery. According to their plan, which the record shows was primarily formulated by Wilkins, one of the Wilkins' companions grabbed the woman working behind the counter, Nancy Allen, and held her while Wilkins viciously inflicted multiple, fatal stab wounds. A few weeks later, the Kansas City Police Department arrested Wilkins and his accomplices.

After questioning by the police, Wilkins confessed to the murder and robbery. A juvenile court, after denying a defense motion for a mental examination, determined that Wilkins could be tried as an adult. At the arraignment, Wilkins' court-appointed counsel, Fred Duchardt, entered pleas of not guilty and not guilty by reason of mental disease or defect. Pursuant to that plea, the Missouri trial court ordered Dr. Steven Mandracchia, a psychologist at the Western Missouri

Mental Health Center, to examine Wilkins. Dr. Mandracchia initially examined Wilkins on November 27, 1985, and concluded in his subsequent written report that Wilkins was competent to stand trial and that at the time of the offense, Wilkins was not suffering from a mental disease or defect within the meaning of the Missouri statute. (J.A. at 908-14.)

In January 1986, Wilkins informed Mr. Duchardt that he wished to be executed, which prompted Mr. Duchardt to have Wilkins examined a second time. In March 1986, Dr. William Logan, a psychiatrist at the Menninger Foundation, examined Wilkins and found that although Wilkins' mental state at the time of the crime did not meet the legal criteria for insanity under Missouri law, he believed that Wilkins suffered from a mental disease and that his mental functioning was significantly impaired. (Id. at 930.) Dr. Logan did not make a conclusive finding regarding Wilkins' competency to stand trial, but he wrote that "emotional issues may prevent him from acting in his own best interests." (Id. at 928.)

On April 16, 1986, the Missouri trial court conducted a competency hearing at which both Dr. Mandracchia and Dr. Logan testified. Dr. Mandracchia reiterated his earlier findings, explaining that he interviewed Wilkins for approximately 95 minutes and believed that he was competent to stand trial. Dr. Logan's testimony was also consistent with his earlier report. He stated that Wilkins was "psychiatrically ill" with a "plethora of mental difficulties" and was a "very impulsive individual who really doesn't think through the consequences of some of his decisions." (Id. at 627, 637.) Dr. Logan, however, did not make an express finding regarding Wilkins' competency to stand trial. At

the competency hearing, neither Dr. Mandracchia nor Dr. Logan offered opinions on Wilkins' capacity to make a knowing, intelligent, and voluntary decision to be executed or to waive constitutional rights. At the conclusion of the testimony, the court found Wilkins to be competent to proceed to trial.

Immediately after the court judged Wilkins competent to stand trial, Wilkins stated that he wished to waive his right to counsel and proceed pro se, because he desired to receive a death sentence and his lawyer would not help him get the death penalty. The court postponed a determination on Wilkins' request and set a hearing date for one week later. On April 23, 1986, after some brief questioning by the court, the court accepted Wilkins' waiver of counsel. The court appointed Mr. Duchardt as "standby counsel" to act as a resource person for Wilkins when and if Wilkins called on him. Wilkins then informed the court that he wished to plea guilty to all of the charges against him. The court deferred action on the proposed guilty plea until May 9, 1986.

At the May hearing, he court questioned Wilkins regarding his decision to plead guilty and encouraged him to accept the assistance of counsel. Wilkins reiterated that he did not want the assistance of counsel and wished to plead guilty. The court accepted Wilkins'

pro se guilty pleas[3] and scheduled a sentencing hearing for June 27, 1986.

At the sentencing hearing, he state presented evidence of the crime and contended that because the crime involved depravity of mind and was committed in the course of a robbery, there were sufficient aggravating circumstances to warrant the death penalty. Wilkins continued to proceed pro se, through standby counsel was present. Dr. Logan testified about Wilkins' mental health background at sentencing, but Wilkins objected to some of the mitigating circumstances thus offered. The trial court sustained most of Wilkins' objections. Wilkins explained that he preferred the death penalty over life in prison. At the conclusion of the sentencing hearing, the court sentenced Wilkins to death. He was 17. He took no steps to appeal his plea or his sentence.

The Supreme Court of Missouri appointed the state public defender as amicus curiae to brief and argue "any issue subject to review" during the mandatory statutory review of his death sentence. Wilkins, acting as his own attorney, appeared personally and told the Supreme Court of Missouri that he did not want the assistance of an attorney, and he took issue with some of the remarks made by the public defenders

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[3]In addition to pleading guilty to first degree murder, Wilkins pled guilty to unlawful use of a weapon and armed criminal action. He was sentenced to life imprisonment on the armed criminal action charge and to five years' imprisonment for unlawful use of a weapon. The district court's decision in this habeas case only addressed Wilkins' murder conviction and death sentence. See Wilkins, 933 F.Supp. at 1501.

arguing the case. he also told the Supreme Court of Missouri that his decision to seek the death penalty was a rational one. Wilkins v. State, 802 S.W.2d 491, 496 (Mo. 1991) (en banc). After hearing and observing Wilkins as he attempted to waive counsel at this proceeding, the court ordered Dr. Sam Parwatikar, a psychiatrist with the Missouri Department of Health, to examine Wilkins with respect to his competence to waive counsel on appeal. After examining Wilkins, Dr. Parwatikar concluded that Wilkins was not capable of waiving his right to counsel. Heeding Dr. Parwatikar's determination, the Supreme court of Missouri set aside its prior proceedings and appointed counsel to represent Wilkins despite his protestations. New briefs were filed and the court heard arguments anew. Nevertheless, the court affirmed Wilkins' conviction and death sentence on a 4-3 vote at the conclusion of its direct statutory review. State v. Wilkins, 736 S.W.2d 409 (Mo. 1987) (en banc).

Less than one year later, on June 30, 1988, Wilkins, who was then 19 years old, decided that he did not want to be executed and filed a motion for postconviction relief pursuant to Missouri Rule of Criminal Procedure 24.035 (1988), in an attempt to set aside his conviction and sentence. Among other claims, Wilkins asserted that his waiver of counsel and guilty plea were not knowingly and voluntarily made. The sentencing court held a hearing regarding Wilkins' motion from May 22 through May 26, 1989. At this postconviction hearing, Wilkins, with the assistance of appointed counsel, introduced the testimony of several psychiatrists and psychologists who had examined him. Dr. Dorothy Lewis, a professor psychiatry at the New York University School of Medicine, explained that Wilkins' paranoia motivated his decision to waive

counsel and that his thought processes were confused and illogical throughout the former proceedings. (State Postconviction Tr. at 27, 47-48.) Dr. William O'Connor, a psychologist, testified that Wilkins' guilty plea was not a voluntary and intelligent decision, but rather an emotionally-driver decision that was the product of his mental disorder. (Id. at 252.) Dr. Logan also testified and agreed with Dr. Parwatikar's earlier conclusion that Wilkins was not "competent" to proceed as his own attorney, even though Dr. Logan was previously ambivalent regarding Wilkins' competence to stand trial. Dr. Logan also believed that Wilkins' waiver of counsel was an emotionally-charged impulsive decision. (Id. at 494.)

In response, the state called Mr. Duchardt and Dr. Mandracchia to testify. Mr. Duchardt stated he did not believe that any of Wilkins' decisions were made knowingly, intelligently, and voluntarily. (Id. at 642.) He had consistently and forcefully made the same point in the trial court's proceedings. Dr. Mandracchia explained that his initial 95-minutes examination was not designed to address the issue of whether Wilkins' waiver of counsel and guilty plea were knowing, intelligent, and voluntary. The postconviction court thus ordered Dr. Mandracchia to perform an additional evaluation of Wilkins that would be directed at these issues. After conducting clinical interviews lasting over seven hours, Dr. Mandracchia concluded that Wilkins' waiver of counsel, guilty plea, and waiver of offering mitigating evidence were made knowingly, but these decisions were not made voluntarily or intelligently. (Tr. of Resumed State Postconviction Hrg. at 893.) Dr. Mandracchia explained that throughout the previous state court proceedings at issue, Wilkins was not capable of considering and appreciating his full range of

options and believed that his only course of action was to receive the death penalty. The postconviction court simply rejected the uncontroverted evidence as "unpersuasive." The postconviction court denied relief, and the Supreme Court of Missouri upheld this decision with one judge dissenting. Wilkins, 802 S.W.2d at 501-02.

Wilkins then filed his petition for a writ of habeas corpus in federal court pursuant to 28 U.S.C. §2254, alleging multiple grounds for relief. The district court granted Wilkins' request for an evidentiary hearing and heard testimony in January 1996. Many of the same doctors who previously testified in the state court proceedings appeared at the federal evidentiary hearing and reiterated their previous findings, indicating that Wilkins' decisions were not made intelligently or voluntarily. Following the hearing, the district court found that Wilkins did not knowingly, intelligently, or voluntarily waive his right to counsel, enter his guilty plea, or waive his right to offer mitigating evidence at sentencing.[4] Thus, the district court conditionally granted Wilkins' petition for habeas corpus relief, which will become a permanent grant of relief unless the state commences proceedings to afford him a new trial within

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[4]The district court also granted relief on two additional grounds: (1) that the prosecutor had a conflict of interest that violated Wilkins' right to due process, and (2) that the Supreme Court of Missouri's proportionality review was performed in a manner that also violated Wilkins' due process rights. Because we uphold the district court's decision to grant relief on the waiver and guilty plea grounds, we find it unnecessary to address the latter two issues.

60 days. The Respondent now challenges the district court's decision to grant habeas relief.

II.

A. Waiver of Counsel

We review the district court's legal conclusions de novo and its factual findings for clear error. Miller v. Lock, 108 F.3d 868, 870 (8th Cir. 1997). We defer to a state court's findings of fact if they are fairly supported by the record. Pryor v. Norris, 103 F.3d 710, 712-13 (8th Cir. 1997). See 28 U.S.C. §2254(d) (1994).

An accused has a constitutional right to self-representation but must knowingly, intelligently, and voluntarily waive the right to counsel. Faretta v. California, 422 U.S. 806, 819-21, 835 (1975). See Abdullah v. Groose, 75 F.3d 408, 412 (8th Cir.), cert. denied, 517 U.S. 1215 (1996). Whether a defendant validly waived his constitutional right to counsel is not a question of historical fact but a question requiring "application of constitutional principles of the facts as found," Brewer v. Williams, 430 U.S. 387, 403 (1977) (internal quotations omitted), which we review de novo. Because the assistance of counsel is crucial to our adversarial system of justice, courts must "indulge every reasonable presumption against the waiver." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (internal quotations omitted), overruled in part on other grounds by Edwards v. Arizona, 451 U.S. 477 (1981). To determine the validity of a waiver of counsel, courts consider the defendant's waiver in light of the totality of the circumstances, "including the background, experience, and conduct of the accused." Young v. Lockhart, 892 F.2d 1348, 1351 (8th Cir. 1989) (internal quotations

omitted). The Supreme Court has explained the requirements for a valid waiver of counsel.

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, 332 U.S. 708, 724 (1948) (plurality). To validly waive counsel, a defendant must actually understand all of the relevant considerations; thorough advice from the court alone is not sufficient. See Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993); United States v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995). Consequently, "[a] judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Von Moltke, 332 U.S. at 724 (plurality). The trial court should not merely take the defendant's statement that h is knowingly and intelligently waiving counsel "at face value." Wise v. Bowersox, 136 F.3d 1197, 1203 (8th Cir. 1998).

The Respondent contends that the district court erroneously found Wilkins' waiver of counsel was not knowing, intelligent, and voluntary without giving proper deference to the state court's findings. We disagree. The district court did not make any findings of historical fact that conflict with the state court's findings of

historical fact. In fact, the state court made no findings of fact relevant to the waiver of counsel. The district court's comprehensive review o the facts simply led it to a legal conclusion regarding waiver of counsel that differs from the state court's determination and demonstrated that the state's court's's conclusion was not fairly supported by the record.

Initially, we note that the state trial court's inquiry to determine the validity of Wilkins' waiver of his right to counsel was not the kind of "penetrating and comprehensive examination" required to ensure that an accused's waiver of counsel is valid. Von Moltke, 332 U.S. at 724 (plurality). The court's colloquy with Wilkins regarding his decision to waive counsel consisted predominantly of leading questions that failed to allow Wilkins to articulate his reasoning process. (See, e.g., J.A. at 648-49, 654-60, 675-694.) While Wilkins' simple "yes" and "no" answers indicated an intention to waive his right to counsel, this does not conclusively establish that his waiver of counsel was valid. A judge has an obligation to penetrate the surface with a more probing inquiry to determine if the waiver is made knowingly, intelligently, and voluntarily. See Von Moltke, 332 U.S. at 724 (plurality). Wilkins did, however, make it very clear to the trial court that the only attorney he would even consider taking was one who would do everything he could to clear Wilkins' path to the gas chamber. (J.A. at 657.)

The record reveals that at no time did the state court explain to Wilkins his possible defenses to the charges against him, nor did the court inform him of lesser included offenses or the full range of punishments that he might receive. (See J.A. at 647-95). The Respondent asserts that the statements

made by Mr. Duchardt during this inquiry establish that Wilkins did understand all of his potential defenses and possible punishments. While Mr. Duchardt indicated to the court that he had attempted to explain all of the available options to Wilkins (see J.A. at 659-60, 662), he testified that he never discussed lesser included offenses or ranges of punishment with Wilkins and that Wilkins did not give him an opportunity to explain all of his potential options (see Postconviction Tr. at 640-43; Dist. Ct. Evid. Hrg. Tr. at 87-88).

The state court also failed to adequately address and consider Wilkins' background in determining the validity of his waiver of counsel. Relying on the decision in Colorado v. Connelly, 479 U.S. 157, 164 (1986), the Respondent contends that a defendant's mental condition and other personal characteristics are not relevant to a determination of voluntariness unless there is proof that the defendant was subjected to coercive pressures. The Respondent's reliance on Colorado, is misplaced because that decision pertains only to the voluntariness of confessions and the application of the exclusionary rule to police conduct during interrogations. In the waiver of counsel context, we have explained that a defendant's background and personal characteristics are highly relevant in determining the validity of such a waiver. Young, 892 F.2d at 1351; see Edwards, 451 U.S. 482. Moreover, the mental health of a defendant is also a relevant consideration in assessing whether a waiver of counsel was knowing, intelligent, and voluntary. See Cash, 47 F.3d at 1088. While a findings of coercion bears upon the voluntary aspect of the waiver, it is not a necessary prerequisite to reach the conclusion that a waiver was not made knowingly, intelligently, and voluntarily.

In the present case, while the state trial court briefly addressed Wilkins' youth and limited educational background (J.A. at 649), the court took no account of Wilkins' upbringing. The record is uncontroverted that Wilkins was severely abused as a child by his mother and her boyfriends, that he had a history of drug abuse, and that by the age of 10, he had been in and out of mental health facilities and had been described as having demonstrated homicidal and suicidal tendencies. Given the combination of Wilkins' young age and the record evidence of his severely troubled childhood, the state trial court's colloquy with Wilkins was far from the kind of in-depth inquiry that is necessary to ensure a valid waiver of counsel.[5]

The state trial court erroneously believed that its previous finding that Wilkins was competent to stand trial was alone sufficient to mandate a conclusion that Wilkins' waiver of counsel was valid. (See J.A. at 650.) We believe this legal error also invaded the direct review proceedings in the Supreme Court of Missouri. See Wilkins, 736 S.W.2d at 415 (holding that "a finding of competency necessarily entails the ability to waive certain rights"). It also permeated the postconviction court's conclusion. (Resp. Ex. G, at 92 ("The court

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[5]We reject out of hand the Respondent's assertion that our evaluation of the state trial court's inquiry regarding the validity of Wilkins' waiver of counsel constitutes a new constitutional rule that may not be applied retroactively under the holding of Teague v. Lane, 489 U.S. 288 (1989). Fifty years ago, in Von Moltke, 332 U.S. at 724 (1948) (plurality), the Supreme Court established the requirement that a judge's inquiry regarding waiver of counsel must be comprehensive and probing.

concludes that he finding of competency of movant to proceed entailed the ability to waive certain rights and to make [the] decision to enter [a] plea of guilty and under the circumstances of this case to waive counsel and proceed pro se.")) It is true that the level of competency required to waive the right to counsel is the same as that required to stand trial. Godniz v. Moran, 509 U.S. 389, 398 (1993); Branscomb v. Norris, 47 F.3d 258, 263 (8th Cir.), cert. denied, 515 U.S. 1109 (1995). The Supreme Court has clarified, however, that a valid waiver of counsel requires more than competency to stand trial. The trial court must also "satisfy itself that the waiver of his constitutional rights is knowing and voluntary." Godinez, 509 U.S. at 400. The Court further explained that the competency inquiry focuses on whether a defendant "has the ability to understand the proceedings" while the knowing and voluntary inquiry is aimed at determining "whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id. at 401 n.12. Relying on settled law, the Court explained, "In this sense there is a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence." Id. at 400-401. The state court committed legal error by concluding that Wilkins' waiver was valid merely because he had been found competent to stand trial. In the postconviction proceeding, the Supreme Court of Missouri articulated the proper standard (that a waiver must also be knowing, intelligent, and voluntary), but affirmed the denial of relief by emphasizing Wilkins' competence, the trial court's opportunity to observe Wilkins, and Wilkins' use of standby counsel "when it met his purposes." Wilkins, 802 S.W.2d at 501-02. These elements,

however, do not necessarily lead to the conclusion that Wilkins voluntarily and intelligently waived counsel.

The uncontroverted record as a whole throughout the state proceedings indicates that Wilkins' waiver of counsel was not knowing, intelligent, and voluntary. The state court accepted Wilkins' waiver of counsel without making findings of fact and without explicitly concluding that Wilkins' waiver was made knowingly, intelligently, and voluntarily. The record before the state trial court simply does not support the conclusion that Wilkins had the requisite level of understanding necessary to establish that his waiver of counsel was knowing, intelligent, and voluntary. In addition to not being informed of all of his potential options, the evidence overwhelmingly indicates that Wilkins' state of mind precluded him from making a valid waiver of counsel. As early as the first competency hearing, Dr. Logan testified to the numerous mental and emotional problems that interfered with Wilkins' "decision making process at certain critical points." (J.A. at 627.) Dr. Logan described Wilkins as "a very impulsive individual who really doesn't think through the consequences of some of his decisions." (Id.) Dr. Logan also indicated that Wilkins' upbringing was devoid of "supervision or tutoring or guidance in terms of how to use his mind to make rational common sense decisions." (Id. at 629.)

On direct review in state court, the Supreme Court of Missouri ordered Dr. Parwatikar to perform a psychiatric evaluation of Wilkins for the purpose of determining Wilkins' capacity to waive the right to counsel on review before that court. He testified at the postconviction hearing that in his opinion, Wilkins was not capable of waiving the right to counsel at the time of his original waiver of counsel and guilty plea. (State

Postconviction Tr. at 849-50.) Dr. Parwatikar attributed Wilkins' inability to validly waive counsel to his mental disorders and upbringing and informed the court that Wilkins was also unable to waive counsel on direct appeal. Acting on Dr. Parwatikar's recommendation, the Supreme Court of Missouri most tellingly refused to permit Wilkins to proceed pro se; it appointed counsel to represent Wilkins on direct review, despite Wilkins' persistent and professed desire to waive counsel at its proceeding as well.

At the state postconviction hearing, the uncontroverted testimony of the several doctors who had examined Wilkins all indicated that he was mentally disturbed and that his decisions to waive counsel and plead guilty were the product of his mental illness and immaturity and not rational decision making. Dr. Logan, who for the first time was then addressing the validity of Wilkins' waiver, stated that Wilkins' decision did not make sense and was impulsive. Moreover, the postconviction court instructed the state's own witness, Dr. Mandracchia, to conduct an additional evaluation after Dr. Mandracchia revealed during the postconviction hearing that his initial examination was not directed at Wilkins' waiver of counsel but at whether Wilkins met the statutory competency requirements to stand trial. After further evaluation, Dr. Mandracchia unequivocally stated that Wilkins' waiver of counsel, while done knowingly, was not made intelligently or voluntarily. (Tr. of Resumed State Postconviction Hrg. at 893.) The state court made no fact-findings to indicate why it was unpersuaded by the unanimous testimony presented at the postconviction hearing, and the record simply does not support the state court's conclusion that Wilkins knowingly, intelligently, and voluntarily waived his right to counsel.

Similar evidence was adduced at the federal evidentiary hearing. Dr. Logan appeared once again and explained that Wilkins was driven by an "internal coercion" that prevented him from voluntarily or intelligently waiving his right to counsel. Wilkins, 933 F.Supp. at 1513. After considering the entire record, we conclude that the district court did not err in finding that Wilkins' waiver of counsel was not made knowingly, intelligently, and voluntarily.

Relying chiefly on the Supreme Court's decision in Drope v. Missouri, 420 U.S. 162 (1975), the Respondent argues that all of the expert testimony submitted after Wilkins' waiver of counsel is not relevant to a determination of the validity of the waiver. In Drope, the issue was whether the trial court sua sponte should have suspended trial until a competency evaluation of the defendant could be made. The Supreme Court noted in a footnote that the after-the-fact testimony of psychiatrists submitted in a postconviction hearing was not relevant to this determination. See Drope, 420 U.S. at 181 & n.17; James v. Singletary, 957 F.2d 1562, 1569-71 (11th Cir. 1992) (discussing Pate v. Robinson, 383 U.S. 375 (1966), upon which Drope heavily relies). Additionally, we have indicated that "[r]etrospective determinations of whether a defendant is competent to stand trial or to plead guilty are strongly disfavored." Weisberg v. State of Minnesota, 29 F.3d 1271, 1278 (8th Cir. 1994), cert. denied, 513 U.S. 1126 (1995). The context of the present case, however, differs significantly from the circumstances in either Drope or Weisberg. In those cases, the defendant attempted to attack his competence to stand trial or to plead guilty without ever having had the benefit of a contemporaneous competency hearing. In the present case, Wilkins'

competency to stand trial (the same level of competency being required to waive counsel) was contemporaneously evaluated, with a focus on whether Wilkins met Missouri's statutory definition of competency, and it is not now at issue. Those contemporaneous evaluations raised immediate, well-founded concern about Wilkins' ability to make a knowing, intelligent, and voluntary waiver, though not specifically addressing that subject. Dr. Logan's contemporaneous evaluation acknowledged in particular the existence of Wilkins' mental and emotional problems as well as the limitations those problems might impose on his ability to make rational decisions. Thus, the subsequent testimony of the same doctors is not the type of after-the-fact speculation of concern in Drope and Weisberg. Given the state trial court's failure to make a probing inquiry in spite of the extensive evidence of Wilkins' background, which had been in the record since the competency hearing, the district court did not err by considering the entire state court record.

B. Guilty Plea and Waiver of Mitigating Evidence

The Respondent asserts that the district court erred in granting Wilkins relief on the claims that his guilty plea and waiver of the right to present mitigating evidence were not made knowingly, intelligently, and voluntarily. Initially, the Respondent contends that Wilkins only raised the issue of his competence in state court and procedurally defaulted these other claims by failing to raise them in the state courts'. We disagree. The record indicates that Wilkins raised these issues in the state postconviction court and the appeal of that decision in the Supreme Court of Missouri, specifically asserting that his guilty plea and waiver of the right to present mitigating evidence were not knowing,

intelligent, and voluntary decisions. Wilkins did not procedurally default these claims.

We also believe that the district court correctly concluded that Wilkins' guilty plea and waiver of presenting mitigating evidence were not knowing, intelligent, and voluntary. To be valid, a guilty plea must represent "a voluntary and intelligent choice among the alterative courses of action open to the defendant," North Carolina v. Alford, 400 U.S. 25, 31 (1970), and the defendant must "possess [ ] an understanding of the law in relation to the facts." McCarthy v. United States, 392 U.S. 459, 466 (1969). We find that Wilkins' guilty plea and waiver of presenting mitigating evidence were not valid for essentially the same reasons that lead us to conclude that his waiver of counsel was not valid.

Initially we note that Wilkins' conclusory affirmation that he was pleading guilty voluntarily does not establish definitively that his plea was in fact valid. See Von Moltke, 332 U.S. at 724; Gonzales v. Grammar, 848 F.2d 894, 900 (8th Cir. 1988). As demonstrated above, the record indicates that Wilkins' youth, troubled background, and substantial mental impairments clouded his decision-making throughout the state proceedings. At the state postconviction hearing, Dr. Mandracchia directly stated his opinion that neither Wilkins' guilty plea nor his waiver of presenting mitigating evidence were intelligent or voluntary. Moreover, the record does not establish that Wilkins possessed the required "understanding of the law in relation to the facts." Mccarthy, 394 U.S. at 466. As mentioned earlier, the state court did not discuss possible defenses such as diminished capacity; the court failed to inform Wilkins of possible lesser included

offenses such as second degree murder and manslaughter; and the court did not explain the full range of potential sentences that Wilkins could receive. The court limited its discussion of sentences to the death penalty and life imprisonment without parole. (J.A. at 676, 682, 695-96.) The court's omission of other potential sentences is quite significant in light of Wilkins' statement to the court that he did not absolutely wish fr the death penalty but merely preferred it over spending the rest of his life in prison. (See J.A. 791-92.) Additional reports from Dr. Mandracchia indicate that Wilkins did not understand his legal alternatives. Dr. Mandracchia stated that Wilkins "would not, and functionally, could not, meaningfully entertain possibilities such as acquittal, insanity defense, conviction for a lesser included offense, mitigating circumstances, parole following a period of incarceration, etc." (Appellee's Br. at 14, citing Ex. P-33 at 4.) In light of this evidence, we conclude that the district court properly determined that Wilkins did not knowingly, intelligently, and voluntarily plead guilty and waive his right to present mitigating evidence.

C. Evidentiary Hearing

The Respondent claims that the district court erred in holding an evidentiary hearing. The Respondent asserts that the district court's decision to hold an evidentiary hearing stems from Wilkins' failure to fully develop the facts in the state courts and that the district court impermissibly expanded the record. We disagree. The district court held the evidentiary hearing because in its view the state courts had failed to make factual findings on certain issues, ignored the facts with respect to certain issues, and arrived at conclusions that were not supported by the record. Wilkins, 933

F.Supp. at 1504-05. Although the district court was not required to hold a hearing in this case, it exercised its discretionary power in an effort to resolve the deficiencies it found in the state court findings. See Townsend v. Sain, 372 U.S. 293, 318 (1963) (stating that in every case, a district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim"), overruled in part, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992) (holding habeas petitioner has no right to hearing to develop facts not developed in state court proceeding, absent a showing of cause and prejudice). See also Clemmons v. Delo, 124 F.3d 944, 952 (8th Cir. 1997) (noting that the Supreme Court's decision in Keeney v. Tamayo-Reyes did not alter a court's discretionary power to order an evidentiary hearing), cert. denied, 118 S.Ct. 1548 (1998); Jamison v. Lockhart, 975 F.2d 1377, 1381 (8th Cir. 1992) (same). The district court did not abuse its discretion in holding such a hearing in this case.[6]

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[6]Because we find the Respondent's assertion that the petitioner failed to develop the factual record in the state court to be erroneous, we need not decide whether the new statutory provisions concerning when a district court can hold such an evidentiary hearing added to §2254 by the Antiterrorism and Effective Death Penalty Act of 1996, signed into law on April 24, 1996, apply to this case. See 28 U.S.C. §2254(e)(2) (as amended) ("If the applicant has failed to develop the factual basis of a claim in the State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows . . . . "). We note the evidentiary hearing in this case was held some four months before the Act was signed into law. See also Lindh v.

D. Jurisdiction to Vacate Previous Order

Finally, the Respondent contends that the district court erred by vacating its previous order dated May 16, 1995, granting relief on only one of Wilkins' claims, after our court remanded the case "for resolution of all matters contianed in the first amended petition for writ of habeas corpus." (J.A. at 976.) Rule 60(b) of the Federal Rules of Civil Procedure affords district courts much discretion to vacate their orders. See Tungseth v. Mutual of Omaha Ins. Co., 43 F.3d 406, 409 (8th Cir. 1994). The district court did not abuse its discretion or exceed the scope of the remand order by choosing to decide all of Wilkins' claims in a single order. Similarly, we reject he Respondent's assertion that Wilkins' challenge to the validity of his waiver of counsel constitutes an abuse of the writ. The Respondent's abuse-of-the-writ claim hinges upon the argument that the district court exceeded its jurisdiction by vacating its previous order. Because the district court had the authority to vacate its previous order and consider all of Wilkins' claims together, we reject as meritless Respondent's assertion that Wilkins has abused the writ.

III.

In sum, we affirm the judgment of the district court, conditionally granting relief on Wilkins' claims that

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Murphy, 117 S.Ct. 2059, 2067 (1997) ("The provision [28 U.S.C. §2264(b) contained in new Chapter 154] thus confirms that Congress assumed that in the absence of such a provision, §§2254(d) and (e) (as new parts of Chapter 153) would not apply to pending federal habeas cases.")

his waiver of his right to counsel, his guilty plea, and his waiver of the right to present mitigating evidence were not made knowingly, intelligently, and voluntarily. Given our decision to uphold the grant of relief on these claims, we find it unnecessary to review the merits of Wilkins' additional arguments.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

HEATH A. WILKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0861-CV-W-5
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER

This is a petition for writ of habeas corpus under 28 U.S.C. §2254 by Heath A. Wilkins (petitioner), an inmate in custody at Potosi Correctional Center, Potosi, Missouri. The petitioner seeks to vacate his conviction for first degree murder and sentence of death entered by the Circuit court of Clay County, Missouri after petitioner waived counsel and entered a guilty plea.[1]

Background

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[1]The original named respondent in this action was Paul Delo, who was Superintendent of the Potosi Correctional Center when the petition was filed. Since then, Michael Bowersox has replaced Mr. Delo as Superintendent and thus has been substituted as the named respondent. For purposes of simplicity, the Court will refer to the respondent as "the State."

In the summer of 1985, Petitioner, who was then sixteen years old, lived in a public park in Kansas City with three other teenagers, Marjorie Filipiak, Patrick Stevens and Ray Thompson. The four of them planned and carried out the robbery of a liquor store in Avondale, Missouri, on July 27, 1985. According to the plan, Marjorie Filipiak went to the nearby North Kansas City Hospital and called a cab while the three boys went to the liquor store. Ray Thompson stayed outside the store to act as lookout, and Petitioner and Patrick Stevens went inside the store to rob it. During the robbery, Petitioner fatally stabbed the proprietor of the store, Nancy Allen, as Stevens held her.

Acting on an anonymous tip, Kansas City police arrested Petitioner and his associates in the park on August 10, 1985. After questioning by the police, Petitioner confessed to the murder and robbery. Because of his age, a hearing was conducted to determine whether he would be tried as an adult. Fred Duchardt, the Clay County Public Defender, was appointed to represent Petitioner at the hearing. After denying counsel's request for a mental examination, the juvenile court on August 15, 1985, entered an order allowing Petitioner to be tried as an adult.

Petitioner was charged as an adult with the offenses of unlawful use of a weapon, first degree murder and armed criminal action. At arraignment in the Clay County Circuit Court, counsel entered the alternative pleas of not guilty and not guilty by reason of mental disease or defect on Petitioner's behalf. Pursuant to that plea, the court ordered a mental examination of Wilkins. Steven A. Mandracchia, Ph.D., a psychologist at Western Missouri Mental Health Center, examined Wilkins in November, 1985.

In January, 1986, Mr. Duchardt visited petitioner in the Clay County jail. At that time, petitioner told Mr. Duchardt that he wished to be executed. A second examination was performed in March, 1986 by William A. Logan, M.D., a psychiatrist with the Menninger Foundation.

A competency hearing was held on Wednesday, April 16, 1986. Dr. Mandracchia testified that he did not believe petitioner had a mental disease or defect "as defined by" Missouri statute. He gave no opinion whether petitioner had a mental disease or disorder outside of the statutory definition, except that he "agree[d] with the past treatment records and past psychiatric and psychological diagnoses." Dr. Mandracchia concluded that petitioner was "competent to proceed". Although Dr. Mandracchia was not aware of petitioner's desire to be executed when he conducted his examination, he testified at the hearing that this fact did not alter his conclusion regarding petitioner's competency to proceed.

Dr. Logan testified that petitioner was "psychiatrically ill" with a "plethora of mental difficulties". However, he did not give an opinion on petitioner's competency to proceed because he interpreted Missouri law to require a psychotic disorder. Dr. Logan stated that although petitioner had no cognitive deficits, his emotional disabilities "could interfere with his decision-making process at certain critical points." Mr. Duchardt insisted that there was "considerable question" about petitioner's competency. Over Mr. Duchardt's protests, the court found him competent to proceed.

Mr. Wilkins then informed the court that he wanted to be sentenced to death. He also stated that he wanted to waive counsel because Mr. Duchardt would not help him get the death penalty. Counsel again reiterated his belief that petitioner was not acting competently. The court deferred action on Petitioner's request until a hearing the following week. On April 23, 1986, the court accepted the waiver of counsel.

Petitioner immediately asked to plead guilty to all charges and be executed. After a brief hearing two weeks later, the court accepted petitioner's pro se guilty plea on May 9, 1986 and a sentencing hearing was held on June 27, 1986. The State presented evidence of the crime and testimony by Dr. Mandracchia and Dr. Logan. Petitioner objected to any evidence of his mental disorders that could be construed as mitigating and joined in the State's request for the death penalty. The court found that the murder was wantonly vile, horrible or inhuman because it involved depravity of mind, and that the murder was committed in the course of a robbery. Then the court sentenced petitioner to death.

The sentence was reviewed by the Missouri Supreme Court pursuant to Mo. Rev. Stat. §565.035 (1986). The Office of the Public Defender was appointed to act as amicus curae for petitioner on the "appeal". At oral argument, Mr. Wilkins appeared personally before the Missouri Supreme Court, repeated his wish to be executed and requested that amicus counsel be discharged. The court ordered Sam Parwatikar, M.D., a psychiatrist with the Missouri Department of Mental Health, to examine petitioner to determine his "competence to waive counsel" on appeal. Dr. Parwatikar concluded that Petitioner "was

not capable of waiving his constitutional right to counsel."

Amicus counsel then moved to remand the matter to the Circuit Court for an evidentiary hearing on Wilkins' mental competence and waiver in light of Dr. Parwatikar's findings. The State objected, arguing that the review was limited to the statutory criteria in §565.035. The Missouri Supreme Court denied the motion for remand and appointed the Public Defender to act as counsel for Petitioner.

The Missouri Supreme Court affirmed Petitioner's conviction and sentence on direct statutory review, State v. Wilkins, 736 S.W.2d 409 (Mo. banc 1987), with Justices Blackmar, Donnelly and Welliver dissenting on proportionality grounds. Judge Donnelly also wrote separately that proportionality was the only issue properly before the court. On June 30, 1988, the United States Supreme Court granted certiorari to decide whether the execution of a sixteen-year-old offender per se violates the cruel and unusual punishment clause of the Eighth Amendment, and eventually held that it did not. Stanford v. Kentucky, 492 U.S. 361 (1989).

On the same day that the Supreme Court granted certiorari, petitioner filed a motion in the sentencing court pursuant to Mo.R.Crim.P. 24.035 to set aside his convictions and sentences. By that time, petitioner was nineteen years old and did not aspire to be executed. Counsel was appointed to represent Petitioner and a hearing on Wilkins' motion was held May 22-26, 1989. Dorothy Lewis, M.D., Jonathan Pincus, M.D., and William O'Connor, Ph.D., conducted testing and clinical interviews and concluded that

Wilkins suffers from schizoaffective disorder, a mental disease which rendered him incompetent to proceed at the time of his plea. Dr. Logan also testified that had he been asked to respond to the question posed in the Missouri Supreme Court's order to Dr. Parwatikar, he would have concurred with Dr. Parwatikar -- that Wilkins was not "competent" to proceed as his own attorney.

The State called Mr. Duchardt and Dr. Mandracchia. Mr. Duchardt again stated that he believed that Wilkins was not competent at the time of his plea dn sentencing hearing. Dr. Mandracchia testified that he would need to perform an additional examination of Petitioner to respond to the State's question about Wilkins' "competence to waive" counsel. Claiming surprise at Dr. Mandracchia's testimony, the State requested a mental evaluation by Dr. Mandracchia to determine whether petitioner was "competent to waive" his constitutional rights and plead guilty and whether petitioner's waiver of counsel and guilty plea were in fact knowing, intelligent and voluntary. After conducting the court-ordered supplemental examination, Dr. Mandracchia testified that the waiver of counsel, guilty plea and waivers of other constitutional rights were not intelligent and voluntary. Nevertheless, the hearing court denied the motion and the Missouri Supreme Court affirmed. Wilkins v. State, 802 S.W.2d 491 (Mo.) cert. denied Wilkins v. Missouri, 112 S.Ct. 131 (1991).

Petitioner then filed the Petition for Writ of Habeas Corpus currently before this Court. The First Amended Petition alleged thirteen grounds of constitutional error. On May 16, 1995, this Court entered an Order conditionally granting the Writ on one of Petitioner's claims on the basis of the state court

record, without an evidentiary hearing. The Court also considered and denied one other claim, but did not address the eleven remaining claims. After filing a timely notice of appeal, the State requested the Court of Appeals for the Eighth Circuit to remand the case to this Court of resolution of all remaining claims. The motion was granted on October 3, 1995.

After remand, Petitioner renewed his previous request for an evidentiary hearing. Over the State's objections, this Court heard testimony on January 5 and 30, 1996. Petitioner then voluntarily dismissed several claims. On April 23, 1996, this Court set aside the previous Order of May 16, 1995 pursuant to Fed.R.Civ.P. 60(b)6). The six claims remaining in the Amended Petition will now be considered. The facts relevant to each will be outlined as necessary. For the reasons set forth below, the petition will be granted.

Evidentiary Hearing

After the remand from the Court of Appeals, this Court exercised its power to hold an evidentiary hearing on dispositive factual issues in the amended petition. The Court's broad authority to do so is well-established under Townsend v. Sain, 372 U.S. 293 (1963). In Townsend, the Supreme Court held that district courts always have the discretion to hold evidentiary hearings on dispositive factual issues in habeas litigation: "In every case, [the district court] has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." Id., 372 U.S. at 318.

In reliance on Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992), the State asserts that the hearing

was not authorized. The standard adopted in Keeney to limit mandatory hearings in certain situations, however, does not purport in any way to limit a habeas court's prerogative to hear additional evidence if there is a factual dispute on nonfrivolous claims. E.g. Jamison v. Lockhart, 975 F.2d 1377, 1381 (8th Cir. 1992) ("we do not read Tamayo-Reyes as altering our discretionary power to order this hearing"); Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993); Burden v. Zant, 975 F.2d 771, 775 (11th Cir. 1992) rev'd on other grounds 510 U.S. 132 (1994); Sims v. Livesay, 970 F.2d 1575 (6th Cir. 1992). See Yohn v. Love, 76 F.3d 508, 516 (3d Cir. 1996).

The Court also believes that a hearing may have been mandatory. Under Townsend, a federal district court must hold an evidentiary hearing in six situations, including some circumstances in which the state courts previous held a hearing and made fact findings. Townsend, 372 U.S. at 313.2 Although it is not necessary to thoroughly examine the Townsend requirements now becuase there was a discretionary hearing, the Court notes that the first two circumstances

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2A hearing is mandatory if: (1) the merits of the factual dispute were not resolved in the state court hearing; (2) the state factual determination is not supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing or (6) if for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. Townsend, 372 U.S. at 313-319.

in Townsend may have compelled it in this case: (1) the merits of many dispositive facts were not resolved in the state court hearing; and (2) the state courts' determinations on some facts are not supported by the record as a whole.

Again, the State's objection based on Keeny v. Tamayo-Reyes is not persuasive. The limitaton on mandatory hearings imposed by Keeney has no relevance here. Keeney overruled Townsend only in part. It held that a hearing is not mandatory under Townsend's fifth circumstance ("the material facts were not adequately developed at the state court hearing") unless the petitioner can show cause for failing to develop the material facts in the state court and prejudice resulting therefrom or actual innocence. Keeney, 112 S.Ct. at 1719. Petitioner did not fail to develop the material facts in this case. The determinative evidence was presented to the state courts.[3]

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[3]On April 29, 1996, the State filed a motion to preclude consideration of all evidence presented at the hearing in this Court on the basis the April 24, 1996 amendment to 28 U.S.C. §2254(e)(2), which provides:

"If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that (a) the claim relied on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would

After an exhaustive review of the entire file, this Court found that many disputed factual issues were not settled and some findings by the state courts were perplexing. The state record contains ambiguous or contradictory support for certain findings and conclusions, particularly those related to the claims challenging the waiver of counsel and guilty plea. Thus, this Court determined that an evidentiary hearing would be at least prudent and valuable, if not required. Given these concerns, with the prospect of a remand later for a hearing, the Court elected to hear additional evidence. See e.g., Blalock v. Lockhart, 898 F.2d 1367 (8th Cir. 1990). The facts left unresolved by the state courts and the disputable findings will be set forth as necessary in the section of the Order addressing the individual claims for relief.

Presumption of Correctness of State Court Findings

An issue distinct from the power to hold an evidentiary hearing is whether this Court is bound by the state courts' findings on dispositive factual questions. Under 28 U.S.C. §2254(d), a state court's

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be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense."

This Court need not determine whether this provision applies retroactively to the evidentiary hearing this court held in January, 1996. Again, this limitation on evidentiary hearings in a federal habeas court applies where a petitioner failed to develop facts in state court, which did not happen in this case.

factual finding is entitled to a presumption of correctness unless one of seven factors listed in §2254(d)(1)-(7) is present or unless the factual finding "is not fairly supported by the record".[4]

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[4]28 U.S.C. §2254(d) provides in part:
In any proceeding . . . in a Federal court . . . for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction. . . evidenced by . . . adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless . . . the Federal court on a consideration of the record as a whole concludes that such a factual determination is not fairly supported by

This Court is also aware of the changes in the presumption of correctness standard set out in the amendment to §2254 which was signed into law on April 24, 1996.[5] However, the new statute does not govern the determination of any factual issues in this case. [C]ongressional enactments. . . will not be construed to have retroactvie application unless their language requires this result." Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988). At least one district court has already rejected the state's position:

> Although certain provisions of Title I of the Antiterrorism and Effective Death Penalty Act of 1996 contain specific effective dates, neither the Act as a whole nor the amendments to §2254 contains such a date. See, Chapter 154, 28 U.S.C. §266(c). In contrast to Congress' silence with respect to the effective dates of the amendments to §2254, Chpater 154, which applies only to capital cases, contains a specific effective date provision. See, 28 U.S.C. §2266(c) (stating that "Chapter 154 of title 28,

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the record.

[5]That statute, 28 U.S.C. §2254(e)(1), provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The application [sic] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

> United States Code (as amended by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act.") The relevant legislation contains no language indicating that Congress intended the amendments to §2254 to apply to cases such as Petitioner's. The inclusion of language in Chapter 154 to the effect that the provisions in Chapter 154 "apply to cases pending on or after the date of enactment of this Act" indicates that Congress knows how to indicate that new legislation applies to pending cases when it intends to do so. The absence of similar language in the amendments to §2254 indicates that Congress only intended for such amendments to apply prospectively.

Schlup v. Bowersox, No. 4:92CV443, slip op. at 16-17 (E.D. Mo. May 2, 1996). This Court agrees with this sound analysis regarding the retroactivity of this portion of the new legislation.

Moreover, even if the revised provision §2254(e)(1) did apply, there are certain relevant legal doctrines preliminary to §2254(d) or §2254(e)(1) which are not affected by the new statute. The threshold question is what constitutes a "factual" finding, as opposed to a "mixed" question or a purely legal question. Further, common sense dictates that the first exception to the presumption of correctness under §2254(d) -- that the "merits of the factual dispute were not resolved in the state court hearing" -- would continue under the new statute. Here, this Court decides questions of law and decides factual issues not

resolved by the state courts even though the evidence had been developed there. The end result thus is the same, regardless of which statute applies.

Where factual determinations were made in the state court here, this Court affords a "high measure of deference." Sumner v. Mata, 455 U.S. 591, 598 (1982). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even fair support in the record." Marshall v. Lonberger, 459 U.S. 422, 429 (1983).

Further, §2254(d) prvoides that even if the presumption applies, a habeas petitioner may rebut the presumption by establishing "by convicing evidence that the factual determination by the state court was erroneous". Such convincing evidence includes proof presented "at an evidentiary hearing. . . in the federal court." See Demosthenes v. Baal, 494 U.S. 731, 735 91990); Lahay v. Armontrout, 923 F.2d 578 (8th Cir. 1991). Under the new §2254(e)(1), the standard for rebuttal is essentially the same: by "clear and convincing evidence".

Section 2254(d) applies only to the state court's findings of historical facts. Legal conclusions are not entitled to deference on federal habeas corpus review. Wright v. West, 112 S.Ct. 2482 (1992); Sumner, 455 U.S. at 597; Brown v. Allen, 344 U.S. 443 (1953). This Court is also free to conduct an independent review of "so called mixed questions of fact and law which require the application of a legal standard to the historical fact determinations." Thompson v. Keohane, 116 S.Ct. 457, 459 (1995); Cuyler v. Sullivan, 466 U.S. 335, 342

(1980); Jones v. Jones, 938 F.2d 838, 842 (8th Cir. 1991).[6] For each allegation of constitutional error, the court will employ these legal standards in reference to the state courts' findings.

[6]As stated above, new §2254(e)(1) does not change this.

Analysis

I. Waiver of Counsel

Petitioner contends that he was denied his constitutional rights under the Sixth and Fourteenth Amendments because the waiver of his right to counsel was not made knowingly, intelligently and voluntarily. The State argues that he record supports the state courts' conclusion that the waiver was knowing, intelligent and voluntary. The State also asserts that the abuse-of-the-writ defense bars this Court's consideration of the claim after the remand from the Court of Appeals.

A. Abuse of the Writ

The abuse-of-the-writ doctrine generally prohibits a petitioner from raising claims in a subsequent habeas petition that could have been, but were not, raised in the first federal habeas proceeding. McCleskey v. Zant, 499 U.S. 467, 490 (1991). The general bar against abusive claims also extends to successive claims which raise grounds identical to those heared and decided on the merits in a previous petition. Sawyer v. Whitley, 505 U.S. 333 (1992).

This court did determine that petitioner had not validly waived his right to counsel and granted the writ of habeas corpus on that basis in an Order dated May 16, 1995. However, under the procedural circumstances in this case, this is not a successive claim and the abuse-of-the-writ defense is not applicable.

In the previous Order, this Court declined to address eleven of the thirteen allegations of constitutional error raised in the amended petition. The Court of Appeals thus remanded the case, before briefing or arguments on appeal, for resolution of the remaining issues. Petitioner raised the waiver of counsel issue again after remand, perhaps fearing that the failure to do so would be taken as a default. He also voluntarily dismissed with prejudice several other claims, paring down to six the number of remaining claims for relief. This Court then set aside the previous order and judgment under Fed.R.Civ. P. 60(b) so that all six issues would be decided in a single order, for the sake of clarity and judicial economy. Order dated April 23, 1996. Under no tenable theory is the claim barred from this Court's review. See Murray v. Delo, 34 F.3d 1367, 1374 (8th Cir. 1994). This is a first habeas corpus petition to which the doctrine of abuse of the writ does not apply. Lonchar v. Thomas, No. 95-5015 (U.S. Apr. 1, 1996).[7]

B. Merits

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[7]It is unclear from earlier pleadings whether the State asserts a procedural default defense to this claim. The Court notes, however, that the claim is not procedurally barred. The issue was presented to the Missouri Supreme Court in the "Motion to Reverse Judgment and Sentence and to Remand for Appointment of Counsel", filed by appointed amicus counsel after Dr. Parwatikar reported that Petitioner had not intelligently and voluntarily waived his right to counsel. The issue was raised again in the Rule 24.035 appeal, with reference to the relevant federal case law. See Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990).

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a criminal defendant in a state proceeding the right to counsel. Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963). The accused person does have a corollary right to waive counsel and proceed pro se, but only if the waiver is knowing, intelligent and voluntary. Faretta v. California, 422 U.S. 806 (1975). The constitution "imposes the serious and weighty responsibility upon the trial judge [to determine] whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465 (1938). In doing so, the court must "indulge every reasonable presumption against waiver" because the purpose of the right to counsel is "to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights". Id., at 464, 468 (1938) (citing Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937).

"The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson, 304 U.S. at 464. "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948).

The trial court must make a meaningful inquiry to determine whether a particular defendant's waiver of these rights is a "voluntary and intelligent choice among the alternative courses of action". Schone v. Purkett,

15 F.3d 785, 788-89 (8th Cir. 1994). To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Von Moltke, 332 U.S. at 723-24.

Because Johnson commands that the unique characteristics and background of each individual defendant must be examined, the fact that an accused person tells the trial court that "he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility . . . . A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered." Von Moltke, 332 U.S. at 723-724. "[T]he ultimate test for whether there has been a valid waiver of the right to counsel is not the trial court's express advice, but rather the defendant's understanding". United States v. Cash, 47 F.3d 1083, 1088 (11th Cir. 1995).

A finding that a criminal defendant is "competent to proceed" does not resolve the issue whether his waiver of counsel is knowing, intelligent and voluntary.[8] These are two separate questions. Both must be answered in the affirmative before there can be an effective waiver of the constitutional right to counsel.

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[8]Petitioner has dismissed the claim that he was not competent to proceed, which this Court had denied in the previous order.

Godinez v. Moran, 113 S.Ct. 2680 (1993). In Godinez, the United States Supreme Court explained that "when a defendant seeks to waive his right to counsel, a determination that he is competent to stand trial is not enough; the waiver must also be intelligent and voluntary before it can be accepted". Id. at 2688. The Godinez Court finally explained the distinction between these two requirements, which has caused much confusion in this and other cases. The "focus of the competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actual does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id. at 2687, n.12 (emphasis in original) (citations omitted).

Thus, "a finding that a defendant is competent to stand trial. . . . is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." Id. at 2687 citing Parke v. Raley, 113 S.Ct. 517, 523 (1992) (The test is whether the waiver represents a voluntary and intelligent choice among the alternative courses of action open to the defendant), and Faretta, 422 U.S. at 835 (accused must "knowingly and intelligently" forego benefits of right to counsel).

In this case, as in others throughout the circuits before Godinez, the courts and the parties have repeatedly confounded and often interchanged the terms "competency to proceed" with "competency to

waive the right to counsel" and "knowing, intelligent and voluntary waiver of counsel". The misunderstanding may stem from Westbrook v. Arizona, 384 U.S. 150, 150 (1966), where the Supreme Court stated that a state trial court's finding that a defendant was "competent to stand trial" did not resolve the separate issue of his "competence to waive his constitutional right to the assistance of counsel" and proceed pro se. After Westbrook, it was unclear whether there was a different, more stringent test for "competency" required to waive certain rights, such as the right to counsel, than the test for competency to stand trial. The law within this circuit alone was conflicting. Compare Blackmon v. Armontrout, 875 F.2d 164, 166 (8th Cir.) cert. denied, 493 U.S. 939 (1989) and White Hawk v. Solem, 693 F.2d 825, 829-30, n.7 (8th Cir. 1982) cert. denied 460 U.S. 1054 (1983).

In Godinez, the Supreme Court finally settled the matter by explaining what it "had in mind in Westbrook":

> When we distinguished between "competence to stand trial" and "competence to waive the constitutional right to the assistance of counsel, we were using "competence to waive" as a shorthand for the "intelligent and competent waiver" requirement of Johnson v. Zerbst.

Godinez 113 S.Ct. 2688. The Court held that, "[i]n this sense this is a 'heightened' standard for pleading guilty and waiving the right to counsel, but it is not a heightened standard of competence." Id. at 2687 (emphasis in original). Godinez also reaffirmed the trial court's "serious and weighty responsibility . . . to

determine whether there is an intelligent and competent waiver by the accused". Id. at 2688.

The semantic chaos after Westbrook has additional relevance in this habeas corpus proceeding because a state court's determination of competency is a factual finding entitled to a presumption of correctness under §2254(d). Thompson, 116 S.Ct. at 459 citing Maggio v. Fulford, 462 U.S. 111, 117 (1983). However, a "waiver of the Sixth Amendment right to assistance of counsel is not a question of historical fact, but rather requires application of constitutional principles of facts." Thompson, 116 S.Ct. at 459 citing Brewer v. Williams, 430 U.S. 387, 404 and n.4 (1977). Although subsidiary factual findings must be presumed correct, the ultimate question requires an assessment of the totality of circumstances. See Miller v. Fenton, 474 U.S. 104 (1985). This is a matter for independent federal determination. Cuyler, 446 U.S. at 342; Miller, 474 U.S. at 112 (voluntariness of confession context).

The initial question here then, is whether the trial court or the Missouri Supreme Court made the sort of factual findings, evidenced by a written record, which this Court must accept in making the ultimate decision on the waiver of counsel. Sumner, 449 U.S. 539. A state court's resolution of an issue does not always include a finding of historical fact. "There is a fundamental difference between a ruling on a motion, essentially a legal determination, and a finding of fact." Elem v. Purkett, 64 F.3d 1195, 1200 (8th Cir. 1995) quoting Jones, 938 F.2d at 842. If there are such factual findings in the record, then the Court must examine whether one of the exceptions in §2254(d) negates the presumption of correctness. Finally, this

Court will determine the legal conclusion supported by the relevant facts.

The record in this case shows that the trial court made no factual findings when it consented to Petitioner's waiver of counsel. (Cir. Ct. Tr. at 42-90).[9] Rather, the trial judge expressed the mistaken belief that he was obliged to accept the waiver of counsel because Mr. Wilkins had been found competent to proceed. When notified that petitioner sought to waive counsel, the court stated:

> I suppose as long as this court finds that he is competent and able to conduct himself in a competent manner then he will, I guess, be permitted to pursue that avenue that he chooses.
>
> But, on the other hand, at his age and with his lack of legal training and schooling and considering the seriousness of the offense, this court feels that the availability of legal counsel is essential so that he can rely upon it, at least if he wants to, you see?

(Cir. Ct. Tr. at 45-46). See also Cir. Ct. Tr. at 62.

The trial court had just found that petitioner was competent to proceed when defense counsel Fred Duchardt and Mr. Wilkins announced that he wanted to

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[9]The Court will refer to the transcript of the arraignment, competency hearings, pleas of guilty and sentencing before Judge McFarland as the "Circuit Court Transcript" or "Cir. Ct. Tr."

waive counsel, plead guilty and seek the death penalty. (Cir. Ct. Tr. at 42-45). The court told petitioner many times that he had the right to counsel and the right to waive counsel. Acknowledging that petitioner was sixteen years old with only a ninth grade education and no legal knowledge or experience, the court stated that the circumstances of the case cautioned against the waiver of counsel. (Cir. Ct. Tr. at 43-44).[10] The trial judge urged Mr. Wilkins to accept counsel and instructed him to think about his decision for a few days. The court ordered Mr. Duchardt to remain available to answer any questions petitioner might have. (Cir. Ct. Tr. at 59, 67.)

The next hearing on the motion to waive counsel was held one week later. The court again cautioned petitioner about the dangers of proceeding pro se, and informed him about other constitutional rights, reciting a list including the right to confrontation, compulsory process, appeal and so forth. (Cir. Ct. Tr. at 69-79). The court explained that counsel could help protect those rights and expressly told Mr. Wilkins that he faced two possibilities for punishment upon conviction: the death penalty or life in prison without parole. (Cir. Ct. Tr. at 69-79). Petitioner continued to assert that he wanted to waive counsel. (Cir. Ct. Tr. at 70-79). Mr. Duchardt continued to asserts that he did not believe Mr. Wilkins was "competent to make those decisions." (Cir. Ct. Tr. at 41, 81). The court then provided

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[10]The prosecutor also argued that the assistance of counsel may be necessary, and urged to court to require defense counsel to stay available: "We simply believe with the court that there may be some matters where assistance or advice or counsel may be necessary". (Cir. Ct. Tr. at 62).

petitioner with waiver of counsel forms and accepted the waiver, but again advised petitioner to reconsider. (Cir. Ct. Tr. at 83-88, 94-95).

Although the trial court strongly encouraged petitioner to accept the services of counsel, the circumstances of this case demanded more. The Constitution required the trial court to consider the "background and experience" of Mr. Wilkins, who at the time was a juvenile with a long history of institutionalization for mental disorders and suicide attempts. Here, as in Von Moltke, the judge did not make a "penetrating and comprehensive" examination of all the circumstances or "investigate as long and thoroughly" as the circumstances of this case demanded to determine if Mr. Wilkins actually made a knowing, intelligent and voluntary waiver. Von Moltke, 332 U.S. at 723-724.

The omission is significant in this case. Petitioner was a sixteen year-old boy with less than a ninth grade education when he waived his right to counsel, entered the guilty plea and was sentenced to death. He had lived in mental institutions since he was ten. His background before being institutionalized included severe beatings and abuse by his mother and her live-in boyfriends. Child care frequently consisted of being locked alone in a room for hours without toilet facilities. (Cir. Ct. Tr. at 66, 357, 528-534, 358). The mother regularly used illegal drugs. An uncle, with her permission, gave petitioner marijuana and other drugs since he was only six years old "as a joke". (Cir. Ct. Tr. at 523-532).

At Tri-County Mental Health Center in 1979, Psychologist Robert Urie, Ph.D. described petitioner,

then age ten, as "a severely depressed boy with homicidal and suicidal ideation", "borderline thought disorder" and "emotional neglect." (Exhibit 7). Robert Walker, M.D., a psychiatrist, also reported then that he was at "serious risk" of becoming "homicidal and suicidal". (Exhibit 7).

The state court record included accounts from Butterfield Youth Ranch from 1980-1983, where petitioner was institutionalized from age eleven to fourteen. Those records documented bizarre behavior, depression, hallucinations and the mother's lack of interest. (Exhibit 8). In 1982, psychiatrist James Chappel, M.D., reported that petitioner showed "bizarre behaviors, especially when stressed" and possible schizophrenia. (Exhibit 8). Dr. Chappel feared that with stress, petitioner "would decompensate". (Exhibit 8 at 42, 539-545, 793-794).

In 1983 at Crittenton Psychiatric Center, Michael Harty, Ph.D., a psychologist, and Huseni Poonawala, M.D., the treating psychiatrist, predicted that petitioner would have a "psychotic breakdown" and become "violent or self-destructive". (Exhibit 5). By age 16 and at the time of this homicide, petitioner was living in a public park with other troubled teenagers, taking drugs and drinking excessively. (Cir. Ct. Tr. at 540-542).

Immediately before petitioner announced his waiver, psychiatrist Dr. William Logan had testified at the competency hearing that Mr. Wilkins had emotional impairments that caused him to act against his own best interests and "could interfere with his decision making process at certain critical points." (Cir. Ct. Tr. at 22). Dr. Logan had explained that petitioner was very impulsive, had not learned "how to use his mind to

make rational common sense decisions", and that "when it comes to making critical decisions, he's very easily frustrated and prone to give out and just take the quick, easy solution primarily based on how he feels and not on what he thinks or what might be the wisest course of action". (Cir. Ct. Tr. at 23-25).

Instead of further exploring the circumstances in light of this background, the trial court's inquiry here consisted almost entirely of leading questions, recited in a manner directed more toward making a record than meaningfully probing whether the waiver was a "voluntary and intelligent choice among the alternative courses of action." Schone, 15 F.3d at 788-789. Most of Mr. Wilkins' responses are simply "yes" or "no" answers, as if on cross-examination. (Cir. Ct. Tr. at 75-89).[11] The court's extensive use of leading questions on the record and the lack of any reference to his mental disorders provides no fair support for the conclusion that the waiver was intelligent and voluntary. Mental illness is a factor the trial court must consider when ruling on the validity of a waiver. E.g., Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972).

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[11]At the arraignment on October 17, 1985, petitioner said only two words ("yes sir") and the hearing was very brief. (Cir. Ct. Tr. at 3-5). At the competency hearing on April 16, 1986, Mr. Wilkins said nothing. Id. at 6-15. Petitioner then stated that he wanted to waive counsel. Although the court questioned him for several minutes, petitioner's responses were very limited. In the Hearing on Waiver of Counsel, on April 23, 1986, the court asked only a series of generic standard leading questions. petitioner, answered all questions with "yes", "no" or a nod. Id. at 69-96.

The Missouri Supreme Court also erroneously equated "competency to proceed" with the requirements for a waiver of the constitutional right to counsel. In the opinion on the mandatory statutory direct review of the conviction and sentence of death under Mo. Rev. Stat. §565.035, the court states that "any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of Miranda" and that "juveniles may validly waive the right to counsel". State v. Wilkins, 736 S.W.2d 409, 415 (Mo. 1987). This legal conclusion sets forth no finding of fact entitled to a presumption of correctness. Thompson, 116 S.Ct. at 459; Brewer, 430 U.S. at 404; Cuyler, 446 U.S. at 342.

The Missouri Supreme Court did make some factual findings on the statutory direct review which are entitled to a presumption of correctness under §2254(d). None of those findings, however, require the legal conclusion that Mr. Wilkins' waiver of counsel was knowing, intelligent and voluntary. The court found that the trial judge tried to dissuade petitioner from waiving counsel and had "admonished" petitioner to "talk to those whom he trusted and who could advise him about his chosen course"[12] and stated that the judge had urged petitioner to change his mind. Wilkins, 736 S.W.2d at 411-413. This finding, however, relates only to the trial court's recommendation. It does not compel the conclusion that Mr. Wilkins intelligently and

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[12]The record also shows that petitioner did not talk to anyone else about the decision to waive counsel. When the trial judge asked petitioner if he had consulted with anyone about that, Mr. Wilkins replied "There's nobody else, nobody else who has a hand in my decision, your honor." (Cir. Ct. Tr. at 75).

voluntarily waived his rights. "The ultimate test for whether there has been a valid waiver of the right to counsel is not the trial court's advice, but rather the defendant's understanding." Cash, 47 F.3d at 1088. A detailed admonition by the trial court on the record does not necessarily mean that the defendant acted knowingly, intelligently and voluntarily.

Moreover, the Missouri Supreme Court's appointment of counsel for Mr. Wilkins on the direct review and order for additional briefing and oral argument is consistent only with a finding that Petitioner validly did not intelligently and voluntarily waive his right to counsel. As outlined above, that court had initially appointed amicus counsel to brief issues and appear at arguments. However, when petitioner asked to waive amicus counsel on appeal, the court ordered Dr. Sam Parwatikar to examine him regarding his "competence to waive his right to counsel". (Exhibit 32).[13] After Dr. Parwatikar's evaluation, which included a review of all prior records and an extensive personal interview, he reported back to the court that Mr. Wilkins had mental

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[13]Again, the language has caused confusion. Dr. Parwatikar responded in the same terms. However, he explained to this Court that he interpreted the order as asking whether petitioner's waiver of counsel was knowing, intelligent and voluntary. He determined it was not. Dr. Parwatikar testified that petitioner's decision to waive counsel was not a rational choice because his reasoning process was irrational. Dr. Parwatikar further noted that petitioner's mental disorders made him less capable that other sixteen year old boys in making intelligent and voluntary decisions. (§2254 Hrg. Tr. 1-30-96 at 19).

disorders that "affect his rational reasoning and impair his behavior". Dr. Parwatikar concluded that petitioner was "not competent to waive his constitutional right to counsel." (Exhibit 13 at 16).

After receiving Dr. Parwatikar's report, the Missouri Supreme Court appointed counsel to represent Mr. Wilkins on appeal and ordered supplemental briefs and argument. (Order of Mo. Sup. Ct., Jan. 26, 1987). The court's opinion on direct appeal refers to Mr. Wilkins request to waive counsel, its order for the evaluation from the Department of Mental health and their subsequent appointment of counsel, but neglects to set forth the findings of Dr. Parwatikar that prompted the court to refuse petitioner's request and to appoint counsel. Wilkins, 736 S.W.2d at 411. The court's actions, however, constitute a findings in accord with Dr. Parwatikar's report: that the waiver of counsel was not intelligent and voluntary. See e.g., Parker v. Dugger, 498 U.S. 308, 316 (1991).

On the collateral review under Mo.R.Crim.P. 24.035, the state postconviction court did not make any findings binding on this Court.[14] The postconviction court listed several factual findings that support petitioner's competency to proceed, but that issue is not before this Court. The court's conclusion that the waiver of counsel was valid was again based on the erroneous legal view that a determination of

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[14]The Court will refer to the Findings and Conclusions by the trial court on the motion for postconviction relief under Mo.R.Crim.P. 24.035 as R.24.035 Order. The transcript from the evidentiary hearing on that motion will be designated R.24.035 Tr.

competency necessarily includes a valid waiver of the right to counsel. R.24.035 Order at 5-9. The only part of the court's order that addresses the waiver of counsel states:

> The court concludes that the finding of competency of movant to proceed entailed the ability to waive certain rights and to make decision necessary for the disposition of the case including the decision to enter plea of guilty and under the circumstances of this case to waive counsel and proceed pro se. The court also concludes a review of all the evidence shows that movant knowingly, voluntarily, and intelligently, and competently waived his right to counsel. The court further concludes that movant suffered no deprivation under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution.
>
> Court further concludes that no prejudice resulted to movant because of his waiver of counsel. The court concludes that movant is not entitled to relief because of his change of feeling regarding the death penalty.
>
> Court concludes movant was mentally competent to proceed as his own counsel.

R.24.035 Order at 9-10. This ruling is a legal determination not compelled by any findings of historical fact, and thus is not entitled to a presumption of

correctness. See Elem, 64 F.3d at 1200; Jones, 938 F.2d at 842.

The state postconviction court made no reference to extensive evidence regarding the background of petitioner, a necessary consideration in determining whether his waiver of counsel was knowing, intelligent and voluntary. Von Moltke, 332 U.S. at 723-724; Johnson, 304 U.S. at 464. In addition to the mental health professionals who examined and treated petitioner before the crime, other mental health experts examined him and testified in the state court that he was "severely disturbed".

Dr. Logan testified at the state evidentiary hearing that petitioner's lifetime without affection and nurturance had caused a "profound developmental arrest", severe mental disturbances and that he had attempted suicide several times. (Exhibit 14 and Cir. Ct. Tr. 467-472, 511). Dr. Logan affirmed at this Court's hearing that petitioner was extremely disturbed and immature at age sixteen. His opinion is that petitioner did not voluntarily or intelligently waive his right to counsel and that he was strongly affected by "internal coercion". (§2254 Hrg. Tr. at 21-23).

Dr. Dorothy Lewis, a psychiatrist, testified in the state court that Mr. Wilkins had a strong family history of psychotic illnesses, had hallucinations and was paranoid. This was consistent with an earlier diagnosis of "childhood psychosis". (Cir. Ct. Tr. at 24-26, 32-75). Dr. Lewis stated that petitioner's "paranoid orientation . . . played a major role in his dismissing his attorney." (Cir. Ct. Tr. at 28).

Dr. William O'Connor, a clinical psychologist, agreed that petitioner was "probably psychotic". (Cir. Ct. Tr. at 139-170). Dr. Jonathan Pincus, a neurologist, confirmed an earlier 1982 diagnosis of schizoaffective disorder. (Cir. Ct. Tr. at 319-327).

It is puzzling and inexplicable why the state court did not make any findings or address whether petitioner's disturbing background of mental serious disorders had any bearing on his waiver of counsel and guilty plea. The state court's only reference to the hearing was the conclusion that "the court further finds the testimony of the doctors relied upon by movant to be unpersuasive and can find no basis for disturbing the court's prior findings of movant's competency." R. 24.035 Order at 9.[15]

After a careful examination of the record as a whole, this Court concludes that the finding is not entitled to a presumption of correctness because it does not resolve the factual dispute and is not fairly supported by the record. §2254(d). The trial court does not explain which doctors it found to be "unpersuasive" or why. The judge does not set out whether he believed that any or all of the doctors were mistaken, lying or whether he just believed their testimony was irrelevant in light of his mistaken view of the law. The court did not make an credibility determination and did not refer to the substance of any expert's testimony.

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[15]The express wording of the order refers only to competency, but the court made the finding under "Point III" of the order, which purports to address the waiver of counsel. See R. 24.035 Order at 5-10.

Even more important, the trial court failed to even mention that Dr. Mandracchia, a witness for the state, testified that petitioner did not voluntarily and intelligently waive his right to counsel or plead guilty. (Exhibit 33 and Cir. Ct. Tr. 891-904). Although the court made findings that Dr. Mandracchia believed petitioner was competent to stand trial, it did not refer to his testimony about the waiver of counsel and guilty plea. (R.24.035 Order at 12-13). The exclusion is conspicuous because the trial court, at the state's request, had expressly ordered Dr. Mandracchia to conduct an additional examination to determine whether petitioner's waiver of counsel, guilty plea and waiver of mitigation were made "knowingly, voluntarily and intelligently". (Exhibit 35).

After examining petitioner as directed, Dr. Mandracchia reported:

> 1. In the opinion of this examiner, the Movant's waiver of counsel was made knowingly but not voluntarily or intelligently.
>
> 2. In the opinion of the examiner, the Movant's plea of guilty and waiver of trial by jury was made knowingly but not voluntarily or intelligently; therefore, the Movant is not viewed as having been competent to make such a decision.
>
> 3. In the opinion of the examiner, the Movant's waiver of his right to offer evidence in mitigation of punishment was made knowingly but not voluntarily or intelligently; therefore, the movant is

> viewed as not having been competent to have made such a decision.

(Exhibit 33 at 5). Dr. Mandracchia further explained the reasons for his opinions at the Rule 24.035 hearing, stating that petitioner's reasoning in making the decision was seriously defective, that he did not consider alternative options and did not reach his decision in a logical fashion. (Cir. Ct. Tr. at 891-904). The Missouri Supreme Court did not address Dr. Mandracchia's report. State court findings are not supported by the record as a whole if the court simply ignores or omits crucial evidence. See e.g., Walker v. Solem, 648 F.2d 1188, 1191 (8th Cir. 1981).

In this Court's hearing, Dr. Mandracchia credibly and confidentially testified to his belief that petitioner's waiver of counsel and guilty plea were not voluntary or intelligent. (§2254 Hrg. Tr. on 1-5-96 at 50, 70-77). He explained that he reached his conclusion after consulting with other professionals and considering several factors, psychiatric records, interviews with petitioner, review of all court transcripts and discussions with Mr. Duchardt. (Id. at 74). Dr. Mandracchia testified that it was petitioner's process in making the decision, rather than the decision itself, that was not intelligent and voluntary. Petitioner was obsessed with getting the death penalty and did not explore or consider any other options. (Id. at 51). Dr. Mandracchia explained that although some sixteen year old boys might be able to voluntarily and intelligently waive such rights, petitioner did not. Id. at 73, 76-77. The record indicates that the state courts gave inadequate weight in this case to petitioner's young age at the time of the waiver. Dr. Mandracchia's findings are credible and relevant to the law. See Von Moltke,

332 U.S. at 723-724; Young, 892 F.2d at 1351. The Missouri Supreme Court's did not base its ruling on the appeal of the postconviction motion on any facts which are entitled to deference. As on the statutory proportionality review, the court did make some factual findings entitled to a presumption of correctness, but none that support its conclusion. The Missouri Supreme Court again stated that the trial judge had discouraged petitioner from waiving counsel and that petitioner himself had told the court that he was competent. Wilkins v. State, 802 S.W.2d 491, 494-496 (Mo. 1991). The court found that petitioner had a ninth grade education and "average intelligence", and had "demonstrated a credible level of competence in handling his case". Id. at 501. The court also noted that "considerable portions of defendant's juvenile records offered by the State were kept out by the sustained objections of the defendant himself." Id. at 496.

While there is a presumption of correctness to historical facts such as the court's finding that petitioner had only a ninth grade education and average intelligence, it is hard to appreciate how this shows his waiver was knowing, intelligent and voluntary. The finding regarding his "competence in handling his case" is not fairly supported by the record. Petitioner never really "handled his case". He waived counsel, entered a guilty plea, asked for the death penalty, waived evidence in mitigation, and was sentenced to death. The excluded evidence from the juvenile records mentioned by the court was proof of Petitioner's serious psychiatric history as a child. (Cir. Ct. Tr. at 237).

Other findings are not fairly supported in the record. Contrary to the Missouri Supreme Court's

description, Wilkins, 802 S.W.2d at 502, the hearing court did not make any credibility determinations or state that Dr. Mandracchia's testimony was "unpersuasive". The motion court only referred to the "doctors relied on" by petitioner. (R. 24.035 Order at 9). Dr. Mandracchia was the state's witness.

Even though the trial court made no factual findings, the Missouri Supreme Court assumed the trial judge's conclusion could not be wrong:

> In the protracted proceedings hereinbefore discussed, Judge McFarland perhaps more than any person was favorably positioned to understand defendant and evaluate the evidence. He had ample opportunity to observe the defendant and learn the innermost reason for his decision to waive counsel. This observation and oral examination of the defendant could not be ignored and was necessarily taken into account when assessing the competency of a defendant to waive counsel.

Wilkins, 802 S.W.2d at 501. The court's account of the trial judge's "many hours of counseling and conversations" is contradicted by the record and does not resolve the waiver of counsel issue. The trial court asked very few questions that could not be answered with a "yes" or "no". Neither state court considered petitioner's background or the unanimous opinion of all mental health professionals that the waiver was not

intelligent and voluntary.[16] Further, the Missouri Supreme Court's resolution of the issue repeatedly refers back to Judge McFarland's determination that petitioner was competent to proceed. However, at the time that the trial court made that decision, petitioner had uttered only two words in the court's presence.[17]

The Missouri Supreme Court's most tenuous statement is that "though defendant did not renounce his waiver of counsel, he manifested his cunning, availing himself of the services of "standby" counsel when it met his purpose." Id. at 502. Although the trial court had insisted that Mr. Duchardt remain available as "standby counsel", he did not provide any legal advice or assistance to petitioner. (Cir. Ct. Tr. at 60-69, 81, 161). The designation was artificial. Mr. Duchardt objected in the state court and testified in this Court that he was no more than a reference book that remained on the shelf. (§2254 Hrg. Tr. at 87).

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[16]This Court has found but one passage in the state court record where the trial court asked petitioner to explain the reasons why he wanted to be executed. (See Cir. Ct. Tr. at 296-97). Petitioner's answer does not indicate an awareness of available defenses that might have resulted in a sentence where he would be eligible for parole at some time. Rather, Mr. Wilkins' response is similar to his statements during interviews with Dr. Parwatikar and Dr. Mandracchia where he gives contradictory and inconsistent explanations for his decision.

[17]"Q. (by the court): Are you Heath Wilkins?
A. (by petitioner): Yes, sir.
(Cir. Ct. Tr. at 3).

The ultimate question of waiver is an issue of federal law. For these reasons, and based on the record as whole, this Court concludes that petitioner did not knowingly, voluntarily and intelligently waive his right to counsel.

II. Guilty Plea and Waiver of Mitigation

Analogous to the waiver of counsel claim, Petitioner also asserts that his guilty plea and waiver of mitigation evidence were not knowing, intelligent and voluntary. The State argued that the claim is procedurally barred and that the state court's finding is entitled to a presumption of correctness.

A. Procedural Bar

Petitioner fairly presented this claim to the state postconviction court and the Missouri Supreme Court with factual support and extensive briefs citing to Westbrook v. Arizona, 384 U.S. 150 and Von Moltke, 332 U.S. 708, as outlined above, and Boykin v. Alabama, 398 U.S. 238 (1969), Brady v. United States, 397 U.S. 742 (1970) (voluntariness of guilty plea), as well as Lockett v. Ohio, 438 U.S. 586 (1986) and Eddings v. Oklahoma, 455 U.S. 104 (1982) (mitigating evidence). There is no procedural bar to this Court's review of the merits. Further, the state courts' conclusion is not entitled to a presumption of correctness under §2254(d). This is a mixed question of federal law and fact. Cuyler v. Sullivan, 446 U.S. at 342.

B. Merits

The Unites States Supreme Court has repeatedly pronounced that in order to satisfy the dictates of due process, a plea of guilty must be a knowing, intelligent and voluntary act. E.g. Brady v. United States, 397 U.S. at 748. As with a waiver of counsel, the resolution whether the plea was intelligently made depends on the particular facts and circumstances of each case. See Johnson, 304 U.S. at 463. If petitioner's waiver of counsel was not knowing and intelligent, then the guilty plea entered without counsel also must be invalid. Arsenault v. Massachusetts, 393 U.S. 5 (1968). However, the court will address this claim independently.

Under Boykin v. Alabama, 395 U.S. at 243-44, the trial court must undertake a factual inquiry to determine if the plea is voluntary and made with an understanding of the nature of the charge and consequences of the plea. The Boykin Court admonished state trial courts that the prerequisites of a valid waiver of constitutional rights must be "spread on the record." A federal court will not presume from an incomplete or silent record that there has been a valid waiver of constitution rights:

> Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot assume a waiver of these three important rights from a silent record.

Id. at 243 (footnote and citations omitted).

The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970). The trial court must establish on the record that the defendant understands all elements of the charges, including the required mental state, and the possible ranges of punishment. Henderson v. Morgan, 426 U.S. 637 (1976); Nash v. Israel, 707 F.2d 298 (7th Cir. 1983). [B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." Boykin, 395 U.S. at 243, n.5.

A guilty plea can be involuntary not only because the defendant doesn't understand the nature of the right he is surrendering, Johnson v. Zerbst, 304 U.S. 458, 464-65, but also because he has an incomplete understanding of the charge. Smith v. O'Grady, 312 U.S. 329, 334. "Evidence of guilt establishes a factual basis for the plea, not that the defendant understand the law in relation to the facts." Gregory v. Solem, 774 F.2d 309, 314 8th Cir. 1985) quoting Nash, 707 F.2d at 303, n.8.

The record does not show that petitioner knew or understood the specific elements of the charges he faced or all his "alternative courses of action". There was no discussion of the lesser included offenses of second degree murder or manslaughter. The trial court never explained the different degrees of homicide under Missouri law and the difference in punishment.

Mo. Rev. Stat. §565.020 (1984) provides that a person commits the crimes of murder in the first degree if he "knowingly causes the death of another person after deliberation on the matter." The only possible punishments are death and life in prison without the possibility of parole. Mo. Rev. Stat. §565.032. Second degree murder, which carries a parolable sentence, does not include "deliberation". §565.021; State v. Jackson, 511 S.W.2d 771 (Mo. 1974). Under Missouri law, deliberation means that the defendant acted after reflection, "in a cool frame of mind." State v. Shaw, 569 S.W.2d 375, 377 (Mo. App. 1978). If premeditation and malice are shown, but not deliberation, the offense is murder in the second degree. State v. Ayers, 470 S.W.2d 534 (Mo. 1971).

The record here does not show that Petitioner understood the mental element of the crime charged or the defenses he would relinquish by pleading guilty. The word "deliberation" or its legal equivalent was never used when he entered his guilty plea. (Cir. Ct. Tr. at 104-167). The only words used in relation to mental states were "premeditated" and "knowingly" -- terms that describe the mental state for second degree murder under Missouri law. (Cir. Ct. Tr. at 125). Yet Mr. Wilkins entered a plea of guilty to first degree murder.

Moreover, the trial court expressly told Mr. Wilkins that there were only two potential punishment options: the death penalty and life in prison without parole. (Cir. Ct. Tr. at 77). The record does not establish that petitioner knew, or was ever told, that at a trial, an attorney could present a "diminished responsibility" defense that might result in a conviction

on the lesser included offense of second degree murder and receive a parolable sentence.[18]

The trial judge's constitutional duty to establish on the record the defendant's understanding of a charge with a guilty plea does not depend on whether the charge is complex or simple. However, the trial judge must be even more solicitous in fulfilling this duty when the charge is not readily understandable by a layman." Nash, 707 F.2d at 303, n.6.

Respondent argues that petitioner must have understood about the lesser included option of second degree murder and the diminished responsibility defense because in the hearing on the waiver of counsel Mr. Duchardt told the court that he had "attempted" to tell petitioner his options. This general statement, however, does not satisfy the requirements of Boykin or establish that petitioner understood the elements or difference between first degree murder and second degree murder and the different penalties. See Nash, 707 F.2d at 303.

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[18]The "diminished responsibility" defense permits a defendant to introduce evidence of a mental disease or defect to prove the absence of a particular mental element of the crime. E.g., State v. Anderson, 515 S.W.2d 534, 537 (Mo. 1974); See also Mo. Rev. Stat. §552.015.2. Unlike the defense of "not guilty by reason of insanity", the defendant accepts criminal responsibility for his conduct, but is convicted of a lesser degree of the crime because the mental defect prevented the defendant from forming the mental element of the higher degree of the crime. Id.

Mr. Duchardt never explicitly said what defenses they had discussed. He testified in this Court that he never explained the diminished responsibility defense to him. Mr. Duchardt was certain petitioner did not understand all the possible defenses. (§2254 Hrg. Tr. at 89-90, 93-94, 97, 105-106).[19] The postconviction court praised Mr. Duchardt's "talents and ability [and] also his dedication to his clients in the administration of justice." (R.24.035 Order at 11). Having heard Mr. Duchardt's testimony in the federal hearing and reviewed the record in its entirety, this Court concur's with that court's assessment of his professional integrity. This Court finds the testimony of Mr. Duchardt to be clear and convincing that petitioner's waiver of counsel and plea of guilty were made without an adequate understanding of the charges against him and the available defenses.

Although the trial court asked petitioner whether he understood the rights he was waiving, the judge did not ask him to say what he thought these defenses were. The petitioner's own conclusory statement that he was making an intelligent and voluntary plea is directly contradicted by the record. See Gonzales v. Grammer, 848 F.2d 894, 900 (8th Cir. 1988).

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[19]Mr. Duchardt's testimony was apparently overlooked by the state courts. When asked at the postconviction hearing whether he viewed Mr. Wilkins' decision to dismiss counsel, plead guilty and seek the death penalty as a decision made after "an intelligent weighing of the alternatives", Mr. Duchardt replied: "I never have and I never will." (R.24.035 Hrg. Tr. at 642).

It was particularly important for petitioner to understand the option of a second degree murder conviction because there is much evidence to suggest that, due to his mental disorders, he may not have been capable of deliberation. Although Dr. Logan found that petitioner would be competent to assist an attorney at trial, he testified that petitioner could not deliberate. (Cir. Ct. Tr. at 511-512). Mr. Duchardt, a seasoned defense lawyer, described this case as a very defensible one on this issue of mental state. Indeed, all of petitioner's co-defendants entered pleas of guilty to lesser offenses and received parole-eligible sentences.

Further, the trial court's only inquiry into "voluntariness" during the guilty plea was a question whether petitioner had received any promises or threats. (Cir. Ct. Tr. at 104-165). But when petitioner reported that a guard had assaulted him that day, the court dismissed it without delving into the circumstances or effect of the incident:

Court: Now then, this guilty plea petition consists of 6 pages. One of the things in here, even though you've not signed it, it says question No. 18, "I do not have any complaints against any law enforcement officials concerning my treatment while in jail. I had sufficient food, water, medical care, and bedding and I was not mistreated by any inmate while in jail. There are no exceptions to any of these statements except," and you put yes there. . ." I suffered abuse verbally and physically, 10:40, May 9, 1986, before entering the court."

Petitioner: That is correct.

Court: Do you wish to tell the court more about that?

Petitioner: Yes, I do, your honor. I was proceeding to speak out of the holding cells that they have back here (indicates). And is was told to shut my mouth. And I made the statement as I have a right to speak. And I was told to shut my mouth. And then the officer, I'm not absolutely aware of the officer's name but it's the gentleman standing here at the end of the counter (indicates), went back in here to do his business. Well, he came back some time later and picked me up. And I asked him why he told me to shut my mouth. I said, "couldn't you have stated something like be cool or something like that?" And then I told him that he didn't have to come off to me that way. And he pushed me in my face up against the wall and told me that, you know, he can do whatever he wants or something along the lines of, you know, there's nothing I can do about it, he can do what he wants. And when I told him that wasn't so he said, he goes, "You're nothing but a bad assed murderer." And he made a statement, oh, yeah, he said, "What are you going to do about it?" And he was up in my face when this, you know, he did, he pushed me in my face against the wall and made a statement that I was a bad assed murderer. And then he asked me what I was going to do about it and I didn't say nothing. I just looked at him. And he was right up in my face. And he said, "I thought so," And then he left and we came in here.

Q: All right. Is that the extent of your complaints against your treatment, or about your treatment?

A. Verbally and physically, yeah.

Q: Do you have any other complaints about your treatment while in jail?

A: No.

Q: All right, now, I'll ask you this, as to this treatment that you've complained about, did that have anything to do with your decision to come in here today and waive your right to trial by jury and tell the court that you want to plead guilty?

A: Not that I'm aware of.

Q: Okay. Did you want to sign this petition to enter plea of guilty?

A: Yes, your Honor.

(Cir. Ct. Tr. at 118-120).

The assaulting officer remained in the courtroom throughout the plea and there were no further questions. Although the trial court did not explore this further, Dr. Logan testified that the incident would have intensified petitioner's decision to plead guilty by confirming that the future was hopeless with potential for further abuse. (§2254 Hrg. Tr. at 24).

The record does not establish that the guilty plea was intelligent and voluntary, as required by Boykin, 395 U.S. at 243. The circuit court's record, made with leading questions, does not show that petitioner entered the plea with an understanding of the elements and consequences of all charges and "the alternative courses of action" open to him. See Alford, 400 U.S. at 31. The inquiry did not comply with the court's duty to "investigate as long and as thoroughly as the circumstances of the case demand" in order to protect

petitioner from making an involuntary and unintelligent waiver. Von Moltke, 332 U.S. at 724. The petitioner has established on the record as a whole that the guilty plea was not valid. The conviction can not stand.

III. Juvenile Proceedings

Petitioner next claims that the procedures by which he was ordered to be tried as an adult violated due process because he was given inadequate notice of the certification hearing and because the juvenile court refused to order a mental evaluation. The state argues that the claim is procedurally barred and is not an issue for federal habeas review, but merely a challenge to state law procedures for certification of juveniles.

A. Procedural Bar

The state relies on the Missouri Supreme Court's holding that the claim was defaulted because petitioner did not challenge the certification in the state circuit court requesting dismissal of the information or seeking remand to the juvenile court. Wilkins, 802 S.W.2d at 496-97. A habeas petitioner's failure to comply with a state procedural requirement may bar federal review of the merits if the state bar is "independent and adequate", unless the petitioner shows "cause and prejudice" for the default or a fundamental miscarriage of justice. Wainwright v. Sykes, 433 U.S. 72 (1977). A state procedural rule is not adequate to bar federal relief if the petitioner was acting pro se at the time of the default and did not make a knowing and intelligent waiver of rights. See e.g., Cooper v. Griffin, 455 F.2d 1142 (5th Cir. 1972). The Missouri rule barring a challenge to the certification procedures when a guilty

plea is entered in circuit court does not apply if the guilty plea was not valid. See State v. Simpson, 836 S.W.2d 75 (Mo. App. 1992). Whether a state procedural rule is adequate to bar federal review is an issue of federal law, to be decided by the federal Court. Williams v. Lockhart, 873 F.2d 1129, 1131-32 (8th Cir. 1989). This Court will address the merits of the claim.

B. Merits

Petitioner's hearing in the juvenile court to determine whether he would stand trial as an adult was five days after his arrest. Counsel received notice of the specific charge and factual allegations less than forty eight hours before the hearing. Thus, petitioner argues that counsel had insufficient time to prepare. Although counsel was able to obtain some records from petitioner's juvenile file, he had little time for review or investigation. There were a number of psychiatric records in the file, which indicated a history of serious mental disturbances since age nine. Counsel learned later, however, that other important records were missing.[20] In light of this history, counsel requested the juvenile court to order a mental evaluation of petitioner before deciding whether to waive the juvenile court's jurisdiction, but the court refused. Petitioner contends that the lack of adequate notice and denial of the mental evaluation deprived him of a meaningful adversarial hearing.

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[20]Mr. Duchardt testified before this court that he had no time to prepare before the juvenile certification hearing and that the records he had been given were incomplete. (§2254 Hrg. Tr. at 79-80).

"It is clear beyond dispute that the waiver of [juvenile court] jurisdiction [to permit criminal prosecution as an adult] is a 'critically important' action determining vitally important statutory rights of the juvenile." Kent v. United States, 383 U.S. 541 (1966). Consistent with the serious nature of the proceeding, the Supreme Court has held that such hearings "must measure up to the essentials of due process and fair treatment". Id. at 560-563; see also In re Gault, 387 U.S. 1 (1967). The Gault Court ruled that under the due process clause, fundamental fairness requires that juveniles receive the benefits of essential constitutional provisions, including the right to counsel and proper notice. The mere appointment of counsel for the proceeding does not necessarily satisfy due process. The duty to assign counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Powell v. Alabama, 287 U.S. 45 (1932). The notice to counsel must be adequate to permit sufficient preparation as the particular case demands. See Geboy v. Gray, 471 U.S. 575 (1973).

The Supreme Court has also held that there is a due process right to the assistance of a psychiatric expert if a defendant's mental condition is a significant factor in the case. Ake v. Oklahoma, 470 U.S. 68 (1985). Dr. Logan has testified that if he had been able to evaluate petitioner before the proceeding, he would have advised the juvenile court that petitioner needed a specific type of intensive psychiatric therapy and hospitalization. The treatment could have been provided through the court. Dr. Logan would have refuted the testimony of witnesses from the Division of Youth Services who obviously did not understand the

scope and nature of petitioner's problems. (Cir. Ct. Tr. at 464-467).

The adequacy of notice and need for the mental evaluation are issues which implicate due process concerns. The portions of the juvenile file that were available revealed a significant history of mental problems which suggests the need for further evaluation. Given the seriousness of the charges and petitioner's history of mental illness, the notice to counsel does not seem sufficient to give petitioner the benefit of the adversarial process. See Lankford v. Idaho, 114 S.Ct. 1723, 1733 (1991).

However, in order for petitioner to prevail on this due process claim, he must prove that, under the totality of circumstances, the errors were so prejudicial they rendered the entire proceeding fundamentally unfair. See e.g., Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Petitioner has made no showing that the outcome of the juvenile proceeding would have been any different if counsel had been given additional time to prepare or if a mental evaluation had been ordered. There is no indication that the juvenile court would not have still waived its jurisdiction. Without such proof of prejudice, the claim must be denied.

IV. Conflict of Interest – Prosecutorial Misconduct

Petitioner next asserts that his right to due process of law was violated because the prosecutor, Larry Harmon, had previously represented him in a juvenile case, failed to disclose that prior representation to counsel or the court and used confidential information in prosecuting the case. The state argues that the issue is procedurally defaulted and without merit.

A. Procedural Bar

The Missouri Supreme Court denied this claim on the basis of a procedural bar, stating that the issue was not timely presented in petitioner's first motion for postconviction relief. Wilkins, 802 S.W.2d at 504. Petitioner did raise the issue in a second amended motion filed outside of the time limits in Rule 24.035, but the court refused to consider the merits, holding that the limitation period was mandatory and could not be extended. Id. citing White v. State, 779 S.W.2d 571, 572 (Mo. 1989).

A federal habeas court may consider the merits of a petitioner's procedurally defaulted claims if the petitioner establishes both cause for the prejudice from his default. Wainwright v. Sykes, 433 U.S. at 87; Engle v. Isaac, 456 U.S. 107, 126-130 (1982). To establish cause, petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with eh State procedural rule." Murray v. Carrier, 477 U.S. 478, 488-89 (1986). Proof that the factual basis for the claim was not reasonably available to counsel or that the interference by state officials made compliance impracticable are examples of such factors. Amadeo v. Zant, 486 U.S. 214, 222 (1988); Parkus v. Delo, 33 F.3d 933, 938 (8th Cir. 1994); Bliss v. Lockhart, 891 F.2d 1335, 1341 (8th Cir. 1990).

Petitioner has established cause for his default because the factual basis for his claim was not available to counsel at the time that the first amended postconviction motion was filed on August 30, 1988. Counsel learned for the first time on April 19, 1989 that Mr. Harman had represented petitioner in juvenile court proceedings. On that date, postconviction counsel

found an order from the Juvenile Court, dated 1979, committing petitioner to the Department of Mental Health for psychiatric treatment, which listed Mr. Harman as his attorney. Apparently there is no other record of Mr. Harman's representation because the Juvenile Court file and the Clay County Public Defender file had both been destroyed.

Mr. Harman did not disclose this conflict of interest to the court or to counsel, and counsel could not otherwise reasonably have known of the prosecutor's prior relationship with petitioner. The record shows that in August, 1985, Mr. Duchardt had asked the Western Missouri Mental Health Center for copies of all records on petitioner, but was told by a clerk on August 21, 1985 that none were available. Postconviction counsel began requesting files from the Mental Health Center shortly after being appointed in 1988, but no records were found until April 19, 1989, when a records supervisor searched in the basement files.

When postconviction counsel learned of Mr. Harman's prior involvement with petitioner, he immediately filed the second amended Rule 24.035 motion alleging that Mr. Harman's prosecution of his former client was a conflict of interest that violated due process. After the Missouri Supreme Court refused to consider the merits of the claim on the Rule 24.035 appeal, the issue was presented to that court in a Petition for Writ of Habeas Corpus filed under Missouri Supreme Court Rule 91, with supporting proof. Under these circumstances, factors external to the defense prevented the discovery of the only existing document showing Mr. Harman's prior representation. See Amadeo, 486 U.S. at 222; Parkus, 33 F.3d at 938.

Petitioner did all he could to exhaust the claim in the state court. Principals of comity and federalism are not offended. There is cause to overcome the procedural bar.

B. Merits

As a public defender in 1979, Mr. Harman represented petitioner, then age ten, on a burglary charge in the juvenile court. Petitioner's mental condition was a key issue in those proceedings. A number of confidential psychiatric reports were made which included sensitive personal data about petitioner and information about his attempt to poison his mother a year earlier. The records included opinions by mental health professionals that petitioner was severely depressed and had suicidal and homicidal impulses. The outcome of the 1979 matter was that Mr. Harman stipulated to petitioner's commitment to the Division of Mental Health.

Six years later, as the lead prosecutor on this case, Mr. Harman actively sought a conviction and the death penalty for his former client. There is no question that the prosecutor remembered the earlier representation. On August 14, 1985, the day before the juvenile certification hearing, Mr. Harman requested an advisory opinion on the matter from the Missouri Bar Advisory Committee.[21] The Committee's response, dated August 29, 1985, stated:

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[21]The exact content of Mr. Harman's letter to the Advisory Committee is not clear. The state has not provided a copy of the document to this Court.

> It is the opinion of the Advisory Committee that there would be no conflict of interest for you to prosecute a criminal case against an individual whom you represented in an unrelated juvenile court matter in 1979. This assumes that no information was obtained at the time of the earlier representation which would be used against the defendant in the course of this prosecution.

(Exhibit 23) (emphasis added). The state contends that this answer constitutes a finding that there was no conflict of interest and that the prosecutor violated no ethical rule. This Court is not convinced. The Committee's response is generic and does not refer to any specific circumstances in this case. Under the facts in the record as a whole, the assumption that the matters were "unrelated" or that information obtained in the earlier representation would not be used in the prosecution of Mr. Wilkins is refuted. It is presumed that an attorney received confidential information in the course of representing a client. United States v. Shepard, 675 F.2d 977 (8th Cir. 1982).

The Missouri disciplinary rules, also adopted in this federal district, restrict an attorney's employment adverse to a former client.[22] Rule 1.9 is derived from

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[22]Rule 1.9 provides:
Conflict of Interest: Former Client
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the

counsel's duty to preserve the confidences of his client in order to preserve the integrity of the adversary system. As a prosecutor, however, Mr. Harman also had additional ethical obligations. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." Young v. United States, 481 U.S. 787, 802 (1987) quoting Ethical Consideration (EC) 7-13 of Canon 7 of the American Bar Association Model Code of Professional Responsibility (1982). See also Berger v. United States, 295 U.S. 78 (1938) and EC 5-15 (if there is a possible conflict of interest, lawyer "should resolve all doubts against the propriety of the representation"); EC 906 (lawyer has duty to avoid "not only professional impropriety but also the appearance of impropriety").

Concerns for potential misconduct in this setting are not merely speculative. In Young, 481 U.S. at 807, the Supreme Court noted that "an arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination whether there is an actual conflict of interest is therefore distinct from the determination whether that conflict results in any actual misconduct."

The question for this Court, however, is not whether the prosecutor's actions violated the ethical code. Habeas corpus relief is available only where

---

former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

there are errors of constitutional magnitude. Cupp v. McNaughten, 414 U.S. 141, 146 (1973); Newlon v. Armontrout, 885 F.2d 1328, 1336 (8th Cir. 1989). Petitioner asserts that the prosecutor's failure to disclose his prior representation to the trial court or to counsel violated the due process protections of the United States Constitution.

It is well-settled that a fair trial in a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 523 (1927). There is a constitutional violation of due process when an attorney represents a client and then participates in the prosecution of that client in the same matter or another matter with a substantial relationship to the first. See United States v. Schell, 775 F.2d 559, 566 (4th Cir. 1985); United States v. Wilson, 497 U.S. 602 (8th Cir. 1974); Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985). "The right to due process and a fair trial include the essential element that there is no unfair advantage to the prosecution by reason of a prior professional relationship between [the prosecutor] and a criminal defendant concerning the same or closely related matter." See State v. Boyd, 560 S.W.2d 296 (Mo. App. 1977).

The threshold question then is whether the prosecution for the murder of Nancy Allen had a substantial relationship to the juvenile court matter in 1979. The applicable test is that described in Arkansas v. Dean Foods Products Co., 605 F.2d 380 (8th Cir. 1979) overruled on other grounds in In re Multi-Piece Rim Products Liability Litigation, 612 F.2d 377, 378 (1980):

> The former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action (where) the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation.

Dean Foods, 605 F.2d at 383.

Under the law of this Circuit, "the attorney-client relationship raises an irrefutable presumption that confidences were disclosed." Id. at 384. If there was a substantial relationship between the two matters, and if the prosecutor will be called on to use against his former client any confidential knowledge gained through their former association, then there is prejudice to the accused. Gajewski v. United States, 321 F.2d 261, 267 (8th Cir. 1963). Whether there is a "substantial relationship" involves a full consideration of the facts and circumstances in each case. See Dean Foods, 606 F.2d at 384.

Virtually every issue in this case involves questions of petitioner's mental disturbances. As outlined above, the juvenile certification, waiver of counsel, guilty plea and waiver of mitigation all involved concerns related to petitioner's mental condition. Mr. Harman had confidential knowledge of petitioner's psychological background through his former representation which resulted in commitment to a

mental institution. The Court finds that information was substantially related to the later prosecution. Mr. Harman had the discretion to seek or waive the death penalty, and that decision necessarily involved subjective assessments of petitioner's state of mind and mental health. In a matter of such grave importance, the prosecutor had a duty to disclose his prior representation so that appropriate actions could be taken to preserve the integrity of the proceedings.

This Court has found only one case where a prosecutor has sought the death penalty in a case against a former client that he had personally represented. State v. Stenger, 760 P.2d 357 (Wa. 1988), held that when the death penalty is sought, knowledge about the defendant's background disclosed in the earlier representation becomes "closely interwoven" with the capital case:

> This is because the death penalty is the ultimate punishment and, before the prosecuting attorney may ask imposition of the death penalty, the prosecuting attorney must have reason to believe that there are not sufficient mitigating circumstances to merit leniency . . . . In short, privileged information obtained by the prosecuting attorney when he was the defendant's counsel in the previous case could well work to the accused's disadvantage in this case where the death penalty was sought.

Id. at 360. The Stenger court disqualified the prosecutor. This Court agrees with the reasoning of Stenger. Here, as in Stenger, the capital murder case

prosecuted by the defendant's former lawyer was substantially related to the earlier case.

Mr. Harman also erred by seeking the death penalty, at least in part, on the basis of his own personal opinion that petitioner had no serious mental disturbance. At the sentencing proceeding, Mr. Harman stated:

> The state has attempted to be fair also, your honor, in the sense that we also listed what could be considered as mitigating circumstances, just the evidence touching on those.
>
> Whether or not the defendant was under a severe or substantial emotional disturbance at the time of the crime. We don't believe that that actually existed, but we did go into that with Dr. Logan.
>
> Another one, perhaps, was that we substantially, had substantially impaired capacity to appreciate the criminality of his conduct or the ability to conform his conduct to the requirements of the law.
>
> And we don't think that is a mitigating circumstance that is present in this case. But, we elicited the testimony so the court would have the benefit of both sides.

(Cir. Ct. Tr. at 293) (emphasis added).

A prosecutor's misconduct violates due process if the defendant was prejudiced by the prosecutor's

actions to the extent that the proceeding was fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Dodd v. Nix, 48 F.3d 1071, 1075 (8th Cir. 1995). The prosecutor's personal belief is not the proper basis for a sentence of death. See Newlon, 885 F.2d at 1336. This Court recognizes that "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor". Smith v. Phillips, 455 U.S. 209, 218 (1982). However, fairness was compromised here.

Petitioner was prejudiced by Harman's failure to disclose his personal knowledge of petitioner's prior commitment to the department of mental health and the facts and circumstances underlying that disposition. This was relevant to the court's duty to preserve the adversarial proces and in accepting the guilty plea.

The prosecutor's conflict of interest presents a very serious issue. It seems incredulous to imagine a former defense attorney, privy at one time to the thought of a juvenile defendant so disturbed that he is committed to a mental institution, to then turn prosecutor and accuser seeking the death penalty for his former client without disclosing the relationship to the court and to counsel. This is particularly disturbing in this case because petitioner waived counsel, entered a guilty plea to a capital charge, waived mitigation and was sentenced to death. The presence of a former defense attorney and confidant at the opposing table would certainly inhibit a defendant from trusting his present counsel or taking counsel's assertions of confidentiality very seriously.

"A prosecutor acts in a quasi-judicial capacity, and he and those associated with him should represent public justice and stand indifferent as between the accused and any private interest. . . . An attorney cannot be permitted to assist in the prosecution of a case if, by reason of a professional relationship with the accused, he has acquired a knowledge of facts . . . which are closely interwoven withe [the issues in the case]." People v. Polonowski, 629 N.E.2d 1162, 1165 (Ill. App. 1994) quoting State v. Curry, 272 N.E.2d 669, 672 (Ill. App. 1971).

This is a structural defect which defies analysis by "harmless error standards". See Young, 481 U.S. at 809. Beyond a reasonable doubt, the entire conduct of the criminal proceeding was obviously affected by the conflict of interest caused by the prosecutor's prior representation and his nondisclosure. See Arizona v. Fulminante, 499 U.S. 279, 309 (1990); Chapman v. California, 386 U.S. 18 (1967). On this habeas review, the Court has cautiously considered whether the error had a substantial and injurious effect on the outcome of the case: petitioner's conviction and sentence of death. See Brecht v. Abrahamson, 113 S.Ct. 1710, 1714-1714 (1993). Having considered all facts and circumstances, including petitioner's juvenile history, background of abuse, mental disorders and institutionalization, the prosecutor's access to confidential information and failure to disclose the prior representation, petitioner's refusal of counsel and guilty plea, the Court finds that the error had a substantial and injurious effect on the outcome. See O'Neal v. McAninch, 115 S.Ct. 992, 994 (1995). The writ of habeas corpus will issue on this claim also.

V. Proportionality Review

Petitioner next alleges that the proportionality review conducted by the Missouri Supreme Court was constitutionally flawed in violation of the Eighth Amendment and the Due Process clause of the Fourteenth Amendment. The state responds that the claim does not present any federal constitutional concern.

It is clear that the Eighth Amendment does not require a state appellate court to determine whether a death sentence is proportional to that imposed in other cases. Pulley v. Harris, 465 U.S. 37 (1984). However, the holding of Pulley does not altogether settle the issues raised here. Although not mandated by the Constitution, Section 565.035 of the Missouri Revised Statutes (1986) does require that every death sentence must be reviewed by the Missouri Supreme Court to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." In Pulley, neither the state constitution nor any statute mandated this type of review.

This Court is mindful that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions". Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). However, the concern here is more than a matter of state law. In Hicks v. Oklahoma, 447 U.S. 343, 346 (1980), the Supreme Court held that a state creates a liberty interest when it provides a criminal defendant with a "substantial and legitimate expectation" of certain procedural protections. "[A]n arbitrary deprivation of such entitlement may create an independent federal constitutional violation". Toney v. Gammon, 79 F.3d

693, 699 (8th Cir. 1996) quoting Hicks, 447 U.S. at 346. The whole purpose of the Due Process Clause is to prevent arbitrary deprivations of liberty or property. Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2342 (1994).

This Court is not concerned with the general procedures established for the Missouri Supreme Court's statutory review of death sentences. In that regard, the Eight Circuit has determined that there is "no unfairness or deprivation of due process". Murray v. Delo, 34 F.3d at 1377. The question here, rather, is whether petitioner sustained an arbitrary deprivation of a liberty interest in this particular case.

The Court finds that Mr. Wilkins had a substantial and legitimate expectation that the Missouri Supreme Court's proportionality review would be a thorough and meaningful one, with full consideration of "whether the sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of evidence and the defendant." §565.035. However, the record shows that the court did not consider certain facts necessary for an adequate review in this case.

The Missouri Supreme Court focused only on the aggravating circumstances of the crime and the strength of the evidence of guilt. The court did not appraise the relevance of petitioner's young age in the review. There is no mention that Mr. Wilkins had been committed to the Department of Mental Health at age ten, had been institutionalized for more than three years and that psychiatric and treatment records documented severe emotional disturbances. This evidence directly supported at least two statutory mitigating

circumstances that commanded careful and full consideration. See Mo. Rev. Stat. §565.050. Further, the court gave no regard to the sentences of the other person involved in the homicide.[23]

Three justices dissented for these reasons, with Justice Donnelly writing to detail the factual omissions and law contrary to the court's conclusion:

> First, we consider age. In four capital cases involving youths of comparable age, a life sentence was imposed. State v. Greathouse, 627 S.W.2d 592 (Mo. 1982) (defendant age seventeen); State v. Allen, 710 S.W.2d 912 (Mo. App. 1986) (defendant age sixteen): State v. White, 694 S.W.2d 802 (Mo. App. 1985) (defendant age seventeen); State v. Scott, 651 S.W.2d 199 (Mo. App. 1983) defendant age sixteen). Only one Missouri youth has been sentenced to die who was seventeen years or younger as of his crime. State v. Lashley, 667 S.W.2d 712 (Mo. banc) cert. denied, 469 U.S. 873 (1984).

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[23]Marge Filipiak received a suspended sentence and probation. Ray Thompson was sentenced to 15 years on a reduced charge of second degree murder. Patrick Stevens was sentenced to life imprisonment on the reduced charge of second murder and will be eligible for parole after he has served 15 years. The importance of this consideration has been stressed. See State v. Schneider, 736 S.W.2d 392, 405-06 (Mo. 1987) (J. Blackmar, dissenting).

Wilkins, 736 S.W.2d at 421 (Donnelly, J., dissenting). Justice Donnelly reviewed petitioner's history of mental and emotional disturbances, institutionalization, suicide attempts and history of drug use, citing from reports of the mental health professionals. He concluded:

> On these facts, considering defendant's age, and his significant cognitive-emotional disorder, and connected extensive drug abuse, we hold the sentence excessive and disproportionate.

Id. at 422. This Court agrees with the assessment of Justice Donnelly, which is supported in the record by clear and convincing evidence.

Although the United States Supreme Court does not require a state to do a proportionality comparison in every case, it is well established that the state court must provide a meaningful appellate review as an essential factor in protecting the arbitrary and capricious imposition of the death penalty. Parker v. Dugger, 498 U.S. 308 (1991); Clemmons v. Mississippi, 494 U.S. 738 (1990). The review by the Missouri Supreme Court, however, was not meaningful and resulted in an arbitrary deprivation that violated "petitioner's right to liberty is a denial of due process of law." Hicks, 447 U.S. at 346; Parker, 498 U.S. at 322. See also Vitek v. Jones, 445 U.S. 480, 488-89 (1980); Morrissey v. Brewer, 408 U.S. 471 (1972).

This conclusion does not create a new rule of law under Teague v. Lane, 489 U.S. 288 (1989). The rule of Hicks, holding that a state statute regarding criminal procedure may create a liberty interest triggering due process, was issued in 1980. Petitioner's

conviction was not final until 1989. Stanford v. Kentucky, 109 S.Ct. 2969 (1989). See Griffith v. Kentucky, 479 U.S. 314 (1987). There is no retroactivity bar under Teague.

VI. Aggravating Circumstances

Petitioner's last remaining claim is that his death sentence is cruel and unusual in violation of the Eighth Amendment because the aggravating circumstance "depravity of mind" is unconstitutionally vague. The state does not assert a procedural bar, but defends the issue on the merits.

The trial court sentenced petitioner to death after finding that two aggravating circumstances existed: first, that "the murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery" and second, that "the murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman." (Cir. Ct. Tr. at 300-01).

Petitioner contends that the words "depravity of mind" are unconstitutionally vague in this case because the trial court did not specifically find "torture" and did not explain the basis of this finding. In support, petitioner relies on Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), and Newlon v. Armontrout, 885 F.2d 1328 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990).

The difference between this case and Godfrey, Maynard and Newlon, however, is that Mr. Wilkins was sentenced by the judge, not a jury. In Walton v. Arizona, 497 U.S. 639, 653 (1990), the Supreme Court

held that "trial judges are presumed to know the law and to apply it in making their decisions". This claim is denied.

Conclusion

For the reasons stated above, the Court hold that the petition for writ of habeas corpus will be conditionally granted. This conditional writ shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this Order.

(signature)

SCOTT O. WRIGHT
Senior United States District Judge

May 15, 1996.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

HEATH A. WILKINS,
Petitioner,

JUDGMENT IN A CIVIL CASE

v.

MICHAEL BOWERSOX,
Respondent. Case Number 91-0861-CV-W-5

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the petition for writ of habeas corpus will be conditionally granted. This conditional writ shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this order.

May 15, 1996 — *Date*

R.F. Connor — *Clerk*

(signature)
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS,	)
	)
Petitioner,	)
	)
v.	)No. 91-0861-CV-W-5
	)
PAUL K. DELO	)
	)
Respondent.	)
	)

ORDER

Before the Court are respondent's Motion to Preclude Consideration of Evidence Adduced Before This Court on Petition for Writ of Habeas Corpus, and petitioner's Motion to Expand the Record.

Motion to Preclude Consideration of Evidence

The basis of respondent's motion is the Antiterrorism and Effective Death Penalty Act of 1996, which was signed into law on April 26, 1996, four months after the evidentiary hearing in this case. Respondent contends that the evidence presented at the hearing should not be considered pursuant to § 2254, which states:

> If the appellant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an

evidentiary hearing on the claim unless the appellant shows that --

(A) the claim relies on --

- (i) a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the use of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. sec. 2254 (e) (2) (as amended April 24, 1996).

Respondent argues that this provision applies retroactively to this case because the statute implicates only a new procedural rule, citing Landgraf v. USI Film Products, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). However, that case does not support respondent's position. Landgraf, which involved the retroactivity of compensatory and punitive damage provisions of the Civil Rights Act of 1991, held that there is a "presumption against retroactive legislation [that] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 114

S.Ct. at 1497. The Court adopted the following analysis to determine whether a statute is to be applied retroactively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

114 S.Ct. at 1505. The intent of Congress is therefore the starting point for this Court's resolution of the issue.

It is apparent that Congress did not intend for § 2254 (e) to apply retroactively to pending cases. Although some provisions of the Antiterrorism and Effective Death Penalty Act of 1996 do set forth dates or events upon which they become effective, Congress did not specify an effective date for § 2254 (e). Title I of the Act, designated "Habeas Corpus Reform," contains two sets of revisions to the statutes governing

habeas corpus cases. Those in sections 101 to 106 modify the statutory provisions which apply to all cases brought under the statute, including § 2254 (e). The second set of provisions, section 107 of Subtitle A, designated "Chapter 154--Special Habeas Corpus Procedures in Capital Cases," applies only to capital cases. This section provides for the expedited disposition of habeas corpus actions brought by prisoners under sentence of death, and applies only if a state establishes criteria for the appointment and compensation of competent counsel in state postconviction proceedings.

The statute provides that "Chapter 154 of title 28, United States Code (as amended by subsection (a)) shall apply to cases pending on or after the date of enactment of this Act," but there is no such language regarding §§ 101-106. Thus, it appears that Congress contemplated the issue of retroactivity, but limited retroactive application only to the expedited death penalty provisions.

Respondent's argument that the amendments affect only a "procedural rule" does not resolve the question of retroactivity. In Landgraf, the Court provided more concrete criteria for determining whether legislation should apply retroactively:

> Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence

> would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the procedural posture of the particular case. [citations omitted]. Contrary to Justice Scalia's suggestion, . . . , we do not restrict the presumption against statutory retroactivity to cases involving "vested rights." . . . Nor do we suggest that concerns about retroactivity have no application to procedural rules.

114 S. Ct. at 1499, n. 29. A statute would upset valid reliance interests if it "impos[ed] new burdens on a person after the fact," 114 S. Ct. at 1500. The relevant question is whether the statute would "take away or impair vested rights, or create a new obligation, impose a new duty, or attach a new disability?" 114 S. Ct. at 1499. Under respondent's argument, the statute would increase petitioner's burden of proof and add new obligations on habeas petitioners during the state postconviction process. Given the procedural posture of this case, this Court will not interpret the statute to limit its consideration of the evidence presented at the hearing.

Even if the new statute did apply retroactively, the restrictions on federal evidentiary hearings in § 2254 (e) (2) are triggered only "[i]f the *applicant* has failed to develop the factual basis of a claim in State court proceedings. . . " In this case, petitioner did not fail to do so. The evidence was developed in state court. However, the Missouri Courts made no findings on

several issues, and other findings are not supported by the record as a whole.

28 U.S.C. § 2241 leaves intact the power and duty of federal courts to issue writs of habeas corpus. Indeed, "[a] 'serious constitutional question' would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988), citing Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12 (1986).

Petitioner has advanced meritorious claims, supported by substantial evidence presented in the state court, that his conviction and sentence were obtained in violation of the Constitution. This Court does not interpret any of the newly enacted provisions pertaining to habeas corpus as infringing on this Court's power and duty to adjudicate constitutional claims. Wright v. West, 112 S.Ct. 2482 (192). Where the state court fails to make findings of fact which adequately resolve the constitutional claims that are properly before it, the federal court's duty to adjudicate the claim includes the power to hear evidence. Townsend v. Sain, 372 U.S. 293, 312 (1963). Even under Townsend, a petitioner could forfeit the right to an evidentiary hearing in federal court if his failure to adequately develop material facts was the result of "inexcusable neglect." Id. at 317, citing Faye v. Noia, 372 U.S. 391, 438 (1963). The Court more recently articulated a less forgiving standard for prisoners seeking evidentiary hearings in federal court, requiring a habeas petitioner seeking to present evidence which he had failed to present to the state court to show "cause and prejudice" for his failure. Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

The new statute appears consistent with the direction the Court has taken--to conserve federal judicial resources, and require prisoners to fully develop the factual basis for their constitutional claims in the state court. However, just as Keeney v. Tamayo-Reyes modified Townsend, replacing the "deliberate by-pass" standard with the "cause and prejudice" test of Wainwright v. Sykes, 433 U.S. 72 (1977), the statute restricting evidentiary hearings clearly is directed at heightening the standard for prisoners who, for whatever reason, by-pass the opportunity to develop facts in the state court. Because the statute limits its application to applicants who "fail to adequately develop the factual basis of a claim in state court proceedings," the principles of Townsend remain intact if the petitioner presented the factual basis of his claims in the state court.

Respondent's motion to preclude the consideration of evidence is denied.

Motion to Expand the Record

Petitioner has moved to expand the record and submitted Exhibits T-KK, inclusive, which have been referred to throughout these proceedings and in the state courts. This Court would abuse its discretion if it refused to consider briefs and pleadings filed in the state court, especially in light of respondent's numerous claims of procedural default. See Dobbs v. Zant, 506 U.S. 835 (1993) (per curiam). Petitioner's motion to expand the record with Exhibits T-KK, inclusive, is granted.

Accordingly, it is hereby

ORDERED that respondent's Motion to Preclude Evidence (Doc. #94) is denied. It is further

ORDERED that petitioner's motion to expand the record (doc. #95) is granted.

(signature)

Scott O. Wright
United State District Court
Judge

Dated: May 15, 1996.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Heath Allen Wilkins,	*	
	*	
Appellee,	*	Order Denying Petition
vs.	*	for Rehearing and
	*	Suggestion for Re-
Michael Bowersox,	*	hearing En Banc
	*	
Appellant.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 13, 1998

Order Entered at the Direction of the Court:

(signature - Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH ALLEN WILKINS,	)
	)
Petitioner,	)
	)
vs.	)No. 91-0861-CV-W-5
	)
MICHAEL BOWERSOX	)
	)
Respondent.	)

ORDER

Before this Court is Petitioner Heath A. Wilkins' Motion to Set Aside Order Dated May 16, 1995, and Revised Motion to Dismiss Certain Claims in the Amended Petition. For the reasons set forth below, these motions will be granted.

I. Background

On May 8, 1992, Petitioner filed his First Amended Petition for Writ of Habeas Corpus, alleging thirteen claims for relief. After additional briefing by both parties, as ordered by this Court, Petitioner filed a Motion for Evidentiary Hearing, which the State opposed.[1] On May 16, 1995, this Court entered an

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[1] The original named respondent in this action was Paul Delo, who was Superintendent of the Potosi Correctional Center when the petition was filed. Since then, Michael Bowersox has replaced Mr.

Order conditionally granting the Writ of Habeas Corpus on one of Petitioner's claims on the basis of the record, without an evidentiary hearing. The Court also considered and denied one other claim, but the eleven remaining claims were not addressed. Judgement was entered on May 18, 1995. The State filed Motions to Alter or Amend the Judgment under Fed.R.Civ.P. 59(e) and to Stay the Order and Judgment, which this Court denied on June 16, 1995. After timely filing a notice of appeal, the State requested the Court of Appeals for the Eighth Circuit to remand the case to this Court for resolution of all remaining claims. The motion was granted on October 3, 1995.

After remand, Petitioner renewed his previous request for an evidentiary hearing. Over the State's objections, testimony was heard on January 5 and 30, 1996. Petitioner then filed his Motion to Set Aside the Order dated May 16, 1995, pursuant to Fed. R. Civ. P. 60(b). Post-Hearing Briefs were filed by both parties, and Petitioner moved to dismiss certain claims in the amended petition, with prejudice, paring back the number of claims from thirteen to five.

II. 60(b) Motion

Fed.R.Civ.P. 60(b) serves to relieve a party from a final judgment or order on one of several specified grounds. The rule provides in pertinent part:

Delo as Superintendent and thus has been substituted as the named respondent. For purposes of simplicity, the Court will refer to the respondent as "the State."

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other conduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

What constitutes a reasonable time for filing a motion under Rule 60(b) depends on the particular facts of each case. Harris v. Union Electric Co., 846 F.2d 482 (8th Cir. 1988). In Harris, the court of appeals found that the district court did not abuse its discretion in entertaining a Rule 60(b) (5)-(6) motion made after exhaustion of the appeals process and almost twenty-three months after judgment was entered. Id. In this case, Petitioner's motion was filed on February 8, 1996,

less than four months after the remand order and nine months after this Court's original judgment and order. The appellate process has been suspended with the remand. Under the circumstances of this case, which include an order for remand from the court of appeals, evidentiary hearing and additional briefing, the motion was made within a reasonable time.

Rule 60(b)(6), the provision upon which petitioner relies, affords relief in "exceptional circumstances" where the moving party cannot seek redress "through the usual channels". United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986). The district court has wide discretion in deciding whether or not to grant a motion under Fed.R.Civ.P. 60(b), therefore requiring clear abuse of discretion for reversal. Atkinson v. Prudential Property Company, Inc., 43 F.3d 367, 371 (8th Cir. 1994); Tungseth v. Mutual of Omaha Insurance Co., 43 F.3d 406, 409 (8th Cir. 1994). The rule is fully applicable to habeas corpus actions under 28 U.S.C. § 2254. Browder v. Department of Corrections, 434 U.S. 257 (1978).

The Court reads these standards for relief from judgment to require consideration of how justice can best be served. The Court has weighed a variety of factors, including the value of finality, the probability that an error affected the outcome of the earlier order, the probability that a revised order could better settle the matter, and the costs to the parties. See Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1985). Considering the remand and the fact that this Court had not ruled on all the claims in the petition for writ of habeas corpus, finality has not been compromised. No additional cost to the parties is involved. Petitioner does not attempt to use the motion

as a device merely to avoid the consequences of an adverse judgment or in the absence of an appeal. He prevailed on one claim and seeks to voluntarily dismiss with prejudice the only other claim addressed by this Court in the May 16, 1995 Order.

Further, the State's argument that the motion is the equivalent of a successive habeas petition is untenable in this case. No additional claim has been presented. The parties had not submitted briefs and the Court of Appeals had not reviewed the Order of May 16, 1995 before the State moved for remand. See Murray v. Delo, 34 F.3d 1367, 1374 (8th Cir. 1994). The authority cited by the State, Guinan v. Delo, 5 F.3d 313 (8th Cir. 1993), Bolder v. Armontrout, 983 F.2d 98 (8th Cir. 1992) and Blair v. Armontrout, 976 F.2d 1130 (8th Cir. 1993), is neither dispositive nor relevant here. Those cases all involved habeas corpus litigants whose petitions had been fully reviewed and denied on appeal before new additional claims were raised in this Court. This is a first habeas corpus petition to which the doctrine of abuse of the writ does not apply. Lonchar v. Thomas, No. 95-5015 (U.S. Apr. 1, 1996).

In the interest of judicial economy, Petitioner's motion to dismiss certain claims with prejudice will be granted. There must be a clear understanding, however, that those claims are forever barred. McCleskey v. Zant, 499 U.S. 467 (1991). The Court intends to decide all remaining claims in the Amended Petition in a single revised order. One of the claims this Court had not resolved in the Order of May 16, 1995 is Petitioner's assertion that his guilty plea was not knowing, intelligent and voluntary. This involves questions of fact and law substantially related to the claim regarding the waiver of counsel which was

decided in the previous order. Clarity and judicial economy would dictate that these issues be addressed together in a single order. The testimony presented at the evidentiary hearing after remand has been helpful in that regard. It is certain that an appeal will follow this Court's decision, regardless of the outcome. Appellate review of two separate judgments and a claim that has since been dismissed would be an exercise in futility and confusion. The wiser course of action would be to set aside the previous judgment and order.[2] Accordingly, it is hereby

ORDERED that Petitioner's Motion to Set Aside Order (doc. #81) dated May 16, 1995 is granted. The Judgment dated May 18, 1995 is therefore vacated. It is further

ORDERED that Petitioner's Revised Motion to Dismiss Certain Claims in the Amended Petition (doc. #89) is granted.

(signature)

SCOTT O. WRIGHT
Senior United States Judge

April 23, 1996

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[2] It is not necessary to determine whether the Order of May 16, 1995, which did not dispose of all claims, and the Judgment entered May 18, 1995, constituted a final appealable judgment. Rule 60(b) by its terms operates to set aside final judgments or orders.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2724WMKC

Heath Allen Wilkins,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
v.	*	the Western District of
	*	Missouri
Paul Delo,	*	
	*	
Appellant.	*	

JUDGMENT

The appellant's motion to remand is granted. This appeal is remanded to the district court for resolution of all matters contained in the first amended petition for writ of habeas corpus.

Mandate to issue forthwith.

October 3, 1995

Order Entered at the Direction of the Court:

(signature - Michael E. Gans)

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0861-CV-W-5
	)	
PAUL DELO,	)	
	)	
Respondent.	)	

ORDER

Before the Court are respondent's motions to alter or amend judgment and to stay order and judgment. Respondent moves the Court to alter or amend this Court's May 16, 1995 Order conditionally granting petitioner relief and to stay enforcement of the May 16, 1995 Order pending resolution of respondent's motion to alter or amend judgment.

Respondent's motion to alter or amend judgment will be denied. Respondent's motion to stay order and judgment is therefore moot and will be denied as such.

Accordingly, it is hereby

ORDERED that respondent's motion to alter or amend judgment (document 47) is denied. It is further

ORDERED that respondent's motion to stay order and judgment (document 48) is denied.

(signature)

SCOTT O. WRIGHT
Senior United States District Judge

June 16th, 1995

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 91-0861-CV-W-5
	)	
PAUL K. DELO,	)	
	)	
Respondent.	)	

ORDER

Before the Court is Heath A. Wilkins' First Amended Petition for Writ of Habeas Corpus, the State's[1] response, petitioner's traverse, and supplemental briefs on the issue of petitioner's competency. For the reasons set forth below, Mr. Wilkins' petition will be granted.

I. Background

Petitioner pled guilty to first degree murder and was sentenced to death in the Circuit Court of Clay County, Missouri. The Supreme Court of Missouri affirmed on direct review. The Supreme Court of the United States granted certiorari on a limited issue and affirmed. Petitioner's state post-conviction motion was

[1] The named respondent in this action is Paul Delo, the Superintendent of the Potosi Correctional Center. For purposes of simplicity, the Court will refer to the respondent as "the State."

denied by the sentencing court, the Supreme Court of Missouri affirmed the denial, and the Supreme Court of the United States denied petitioner's writ of certiorari. Petitioner then filed the habeas corpus action currently before the Court.

In July of 1985, petitioner and three companions, Patrick Stevens, Ray Thompson and Marjorie Filipiak, devised a plan to rob Linda's Liquors, a small convenience store in Avondale, Missouri. Pursuant to the plan, on July 27, 1985, petitioner and Stevens entered the store and ordered a sandwich from the store clerk, Nancy Allen. Stevens then seized Allen and petitioner stabbed her repeatedly, inflicting fatal wounds. Petitioner and Stevens gathered cash and merchandise and left the store. The two later joined Thompson and Filipiak to split up the money. On August 10, 1985, petitioner, Stevens, Thompson and Filipiak were arrested for the murder of Nancy Allen.

On August 15, 1985, petitioner, then 16 years old, was certified by the juvenile court to stand trial as an adult. On October 17, 1985, petitioner appeared with appointed counsel, Fred Duchardt, for arraignment in the Circuit Court of Clay County, Missouri before the Honorable Glennon E. McFarland. (Cir. Ct. Tr. at 3).[2] Petitioner was charged with murder in the first degree, unlawful use of a weapon, and armed criminal action. (Cir. Ct. Tr. at 4-5). Petitioner, through counsel, entered a dual plea of not guilty by reason of mental disease or defect excluding responsibility and not guilty. (Cir. Ct.

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[2] The Court will refer to the transcript of the arraignment, competency hearing, pleas of guilty and sentencing before Judge McFarland as the "Circuit Court Transcript," or "Cir. Ct. Tr."

Tr. at 4). Mr. Duchardt informed the court that he questioned whether petitioner was competent to proceed and moved for a mental examination of petitioner. (Cir. Ct. Tr. at 4). The court granted the motion and ordered petitioner to be examined at a state hospital. (Cir. Ct. Tr. at 5).

On November 27, 1985, Dr. Steven Mandracchia, a clinical psychologist for the State Department of Mental Health, performed the mental examination. (Cir. Ct. Tr. at 9). On December 23, 1985, Mr. Duchardt requested and obtained leave of court for an additional mental examination. (Cir. Ct. Tr. at 5-6). The additional examination was performed in March of 1986 by Dr. William Logan, a forensic psychiatrist with the Menniger Clinic. (Cir. Ct. Tr. at 17-18). Sometime between these two examinations, petitioner informed his counsel that he wanted to enter a guilty plea and receive a death sentence.

On April 16, 1986, the court held a hearing on petitioner's competency to stand trial. On direct examination by Mr. Duchardt, Dr. Mandracchia testified that his evaluation of petitioner consisted of interviewing petitioner for approximately ninety-five minutes, reviewing information on petitioner's background and administering the Minnesota Multiphasic Personality Inventory ("M.M.P.I."). (Cir. Ct. Tr. at 9-11). Dr. Mandracchia testified that, based on his evaluation, he did not believe petitioner suffered from a mental disease or defect as defined by Chapter 552 of the Missouri Revised Statutes.[3] (Cir. Ct. Tr. at 11). Dr. Mandracchia

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[3] In 1985, Section 552.020.1 of the Missouri Revised Statutes provided that "[n]o person who as a result of mental disease or defect lacks capacity to

also stated his belief that petitioner was competent to proceed to trial. (Cir. Ct. Tr. at 12).

Mr. Duchardt noted that Mr. Mandracchia had only recently been informed of petitioner's desire to plead guilty and receive the death penalty and asked Dr. Mandracchia if this information changed his opinion as to petitioner's competency. (Cir. Ct. Tr. at 12-13). Dr. Mandracchia stated that it did not. (Cir. Ct. Tr. at 13).

Dr. Logan also testified at the competency hearing. He stated that his evaluation of petitioner consisted of a five-hour psychiatric interview, six hours of psychological testing, and a review of petitioner's extensive psychiatric records. (Cir. Ct. Tr. at 17-18). Dr. Logan stated that he did not reach a definite conclusion as to whether petitioner was competent to proceed. (Cir. Ct. Tr. at 18). Dr. Logan testified that petitioner had a fairly good cognitive understanding of the court proceedings, but that he suffered from an emotional impairment that could interfere with his decision-making process and his ability to act in his own

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understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." Mo. Rev. Stat. § 552.020.1 (1985). Section 552.030.1 provided that "[a] person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect he did not know or appreciate the nature, quality, or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of the law." Mo. Rev. Stat. § 552.030.1 (1985).

best interests. (Cir. Ct. Tr. at 22). Given these factors, Dr. Logan believed it was appropriate to describe his opinion and allow the court to determine whether petitioner was competent to proceed. (Cir. Ct. Tr. at 22-23).

After Dr. Logan's testimony, the court found that petitioner was competent to proceed. (Cir. Ct. Tr. at 42). Petitioner then informed the court that he wished to proceed pro se. (Cir. Ct. Tr. at 42). In response to the court's questions, Mr. Duchardt and petitioner explained that petitioner wanted to proceed pro se because he wanted to plead guilty and seek the death penalty. (Cir. Ct. Tr. at 42-45).

The court advised petitioner of his right to an attorney and his right to proceed without counsel. (Cir. Ct. Tr. at 49-51). Petitioner stated that he did not want an attorney if the attorney could not assist him in seeking the death penalty. (Cir. Ct. Tr. at 52). The court warned petitioner of the problems he could encounter without counsel, but petitioner was unwavering in his desire to proceed without counsel and seek the death penalty. (Cir. Ct. Tr. at 52-59). The court instructed petitioner to think about his decision for a few days and ordered Mr. Duchardt to remain available to answer any questions petitioner might have. (Cir. Ct. Tr. at 59, 67).

The next hearing on petitioner's motion to proceed pro se was held April 23, 1986. The court again cautioned petitioner about the dangers of proceeding pro se and informed petitioner of the advantages of having counsel at the various stages of the proceedings. (Cir. Ct. Tr. at 70-79). Petitioner continued to assert that he wanted to proceed pro se.

(Cir. Ct. Tr. at 70-79). The court provided petitioner with waiver of counsel forms, which petitioner signed and filed with the court. (Cir. Ct. Tr. at 83-87). The court accepted the waivers and granted Mr. Duchardt leave to withdraw, provided he remain available to petitioner for consultation. (Cir. Ct. Tr. at 87-88). At the close of the hearing, the court again advised petitioner to reconsider his course of action. (Cir. Ct. Tr. at 94-95).

On April 29, 1986, the court provided petitioner with petitions to enter pleas of guilty. (Cir. Ct. Tr. at 97-98). The court again advised petitioner of the rights he would waive by entering the pleas and assured petitioner that he could change his mind at any time until the court accepted the guilty pleas. (Cir. Ct. Tr. at 98-102).

On May 9, 1986, the court held the change of plea hearing. The court fully informed petitioner of the various rights he was waiving by entering guilty pleas. (Cir. Ct. Tr. at 110-22). The court asked petitioner if he was entering the pleas voluntarily and explained this meant that the decision to plead guilty was his decision. (Cir. Ct. Tr. at 122-23, 148, 156). Petitioner answered affirmatively. (Cir. Ct. Tr. at 123, 148, 156). The court asked petitioner if he had received any threats, promises or other inducements to persuade him to enter the pleas and petitioner stated he had not. (Cir. Ct. Tr. at 123, 148-49, 156). The court asked petitioner to state the facts relating the crime, which he did. (Cir. Ct. Tr. at 124-28).

The court found that petitioner's pleas were made voluntarily, intelligently and with a full understanding of the charges and consequences of the

pleas. (Cir. Ct. Tr. at 144, 153, 163). The court then accepted each guilty plea and ordered presentence investigation reports. (Cir. Ct. Tr. at 144, 153-54, 163-64).

The sentencing hearing was held on June 27, 1986. Petitioner again appeared pro se, with Mr. Duchardt available for consultation. (Cir. Ct. Tr. at 167-68). Petitioner signed "Waiver of Trial by Jury" and "Waiver of Counsel" forms and stated that he understood their contents. (Cir. Ct. Tr. at 179-83). The court gave petitioner one last opportunity to withdraw his pleas of guilty, but petitioner stated he wanted to continue with the sentencing. (Cir. Ct. Tr. at 184-88).

The State presented evidence of the crime through the police officer called to the scene, the coroner who performed the autopsy of Nancy Allen, an investigating police officer, and Nancy Allen's husband. (Cir. Ct. Tr. at 194-233). The State called Dr. Mandracchia, who testified that petitioner did not suffer from a mental disease or defect, as defined by Missouri law, at the time the crime was committed. (Cir. Ct. Tr. at 246). Dr. Logan testified that petitioner could have had a mental disease or defect at the time the crime was committed, but that the defect was not such that petitioner could not appreciate the nature, quality or wrongfulness of his conduct or conform his conduct to the requirements of the law.[4] (Cir. Ct. Tr. at 270).

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[4] The State also called witnesses to testify about petitioner's juvenile history, however, these witnesses were cut short when the court sustained petitioner's relevancy objections. (Cir. Ct. Tr. at 233-45).

Petitioner's only witness was Patrick Stevens, who asserted his Fifth Amendment right against self-incrimination and refused to answer petitioner's questions. (Cir. Ct. Tr. at 278-29, 287-89). During closing arguments, both the State and petitioner asked the court to impose the death penalty. (Cir. Ct. Tr. at 289-98). After finding that aggravating circumstances existed, the court sentenced petitioner to death. (Cir. Ct. Tr. at 300-02).

Consistent with his announced desire to be put to death, petitioner did not appeal the trial court's judgment and sentence. The Supreme Court of Missouri, however, requested the State Public Defender to enter the case as amicus curiae and brief and argue "any issue subject to review." State v. Wilkins, 736 S.W.2d 409, 411 (Mo. banc 1987).[5] Before the case was argued in the Supreme Court of Missouri, petitioner appeared in person and informed the court that he did not want the assistance of counsel in proceedings before the court. Id. Counsel then argued the case, after which the court allowed petitioner to address the court. Id. Petitioner used the opportunity to contest statements made by the public defender concerning his competency. Id.

The court then stayed the proceedings to determine if petitioner was competent to waive his right to counsel on appeal. Id. The court ordered the State Department of Mental Health to determine petitioner's competence to waive his right to counsel. Id. Dr. S.D.

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[5] Section 565.035.1 of the Missouri Revised Statutes requires the Supreme Court of Missouri to review all sentences of death. Mo. Rev. Stat. § 565.035.1 (1983).

Parwatikar performed the evaluation on behalf of the Department of Mental Health and concluded that petitioner was not competent to waive his right to counsel. (Rule 24.035 Transcript at 848-49). After Dr. Parwatikar filed his report and evaluation, the Supreme Court of Missouri appointed counsel for petitioner, ordered new briefs, and heard argument in the case again. Wilkins, 736 S.W.2d at 411. On September 15, 1987, the Supreme Court of Missouri affirmed the trial court's judgment and sentence. Id. at 417.

The Supreme Court of the United States granted certiorari in Wilkins and a companion case, Stanford v. Kentucky, to decide whether the Eighth Amendment precludes the death penalty for individuals who commit crimes at 16 or 17 years of age. Wilkins v. Missouri, 487 U.S. 1233 (1988); Stanford v. Kentucky, 488 U.S. 887 (1988). The Court found that it did not and, on June 16, 1989, affirmed the judgment of the Supreme Court of Missouri. Stanford v. Kentucky, 492 U.S. 361 (1989).

On June 30, 1988, petitioner moved pursuant to Rule 24.035 of the Supreme Court Rules to set aside his conviction and sentence (Legal File at 1). The sentencing court appointed counsel for petitioner and held a hearing on the motion from May 22-26, and June 5, 1989. The testimony relevant to the issues addressed by this Court is described below.

Petitioner first called Dr. Dorothy Lewis, a psychiatrist, to testify. (R. 24 Tr. at 5-6).[6] Dr. Lewis

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[6] The Court will refer to the transcript of the Rule 24.035 hearing as "R.24 Tr." The transcript itself is titled "Transcript of Rule 29.15 Hearing."

testified that, at the request of the public defender's office, she performed a psychiatric evaluation of petitioner. (R. 24 Tr. at 14-15). The evaluation consisted of a five-hour psychiatric interview of petitioner on August 25, 1988 and a review of petitioner's psychiatric records, juvenile history, and transcripts of the case. (R.24 Tr. at 15-21). Dr. Lewis testified that, in her opinion, petitioner was not competent to stand trial and was not competent to proceed without the assistance of counsel at the time he entered his guilty plea and waived his right to counsel. (R.24 Tr. at 22-23, 47-48, 74-75).

Dr. Lewis stated that, based on petitioner's auditory hallucinations, as documented in his psychiatric records, his illogical thought processes and his paranoid ideation, she believed petitioner was psychotic. (R.24 Tr. at 23-27). She testified that petitioner was able to appear quite rational initially, but after approximately an hour of contact with petitioner, his psychotic condition began to evidence itself. (R.24 Tr. at 24).

Dr. William O'Connor, a clinical psychologist, next testified on behalf of petitioner. (R.24 Tr. at 139). Dr. O'Connor stated that he administered numerous standardized tests to petitioner on January 7, 25, and 31, 1985. (R.24 Tr. at 143). The tests included the Halstead-Reitan neuropsychological battery of tests, a psychological battery[7] and the Luria-Nebraska

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however, Rule 24.035 of the Supreme Court Rules provides for postconviction relief after a plea of guilty, whereas Rule 29.15 provides for relief after a trial.

[7] The psychological battery of tests included a M.M.P.I. (R. 29 Tr. at 147).

neuropsychological battery. (R.24 Tr. at 144). Based on the test results, Dr. O'Connor concluded that petitioner suffered from a schizoaffective disorder. (R.24 Tr. at 154-56). Dr. O'Connor testified that, at the time petitioner entered his plea of guilty, he was not competent to stand trial or proceed without counsel. (R.24 Tr. at 167). Dr. O'Connor stated that, in his opinion, petitioner suffered from a mental illness which severely impaired his ability to anticipate consequences and use judgment. (R.24 Tr. at 174).

Dr. Jonathan Pincus, a professor of neurology and chairman of the Department of Neurology at Georgetown University School of Medicine, also testified on behalf of petitioner. (R.24 Tr. at 309). Dr. Pincus testified that he performed a neurological history examination of petitioner on August 25, 1988 and reviewed petitioner's juvenile records. (R.24 Tr. at 319-20, 323). An E.E.G., M.R.I. scan and SPECT scan were also performed. (R.24 Tr. at 324). Dr. Pincus stated that, in his opinion, petitioner was not competent to proceed or to waive his right to counsel at the time of guilty plea. (R.24 Tr. at 359-61).

Petitioner next called Dr. Logan to testify at the hearing. (R.24 Tr. at 45). Dr. Logan stated that he had not been asked during the initial proceedings to render an opinion concerning petitioner's competency to waive his right to counsel. (R.24 Tr. at 469-70). Dr. Logan believed petitioner suffered form psychiatric difficulties which significantly impacted his ability to make decisions in the case (R.24 Tr. at 471). Dr. Logan testified that petitioner possessed cognitive ability, but that he did not use his ability when making decisions. (R.24 Tr. at 472). Dr. Logan believed petitioner made decisions without actually considering the

consequences of the decisions. (R.24 Tr. at 472). Therefore, Dr. Logan believed, petitioner was not competent to proceed without the assistance of counsel. (R.24 Tr. at 471-72).

Petitioner then recalled Dr. O'Connor. (R.24 Tr. at 666). Dr. O'Connor explained that, at petitioner's counsel's request, he had obtained and reviewed petitioner's results form the M.M.P.I. administered by Dr. Mandracchia in December of 1985. (R.24 Tr. at 666-67). Dr. O'Connor stated that he had rescored the tests results, which provided him with a psychological profile of petitioner at the time the test was administered. (R.24 Tr. at 668).

Dr. O'Connor testified that Dr. Mandracchia's interpretation of the test was not consistent with the standard texts on M.M.P.I. interpretation. (R.24 Tr. at 668). Dr. O'Connor believed the M.M.P.I. results demonstrated that petitioner was not competent to make a knowing, intelligent, voluntary and rational choice between the alternatives available to him at the time he pled guilty. (R.24 Tr. at 688). Petitioner rested after Dr. O'Connor's testimony. (R.24 Tr. at 735).

The State first called Fred Duchardt, petitioner's appointed counsel during the certification hearing in juvenile court and the initial competency hearings. (R.24 Tr. at 611-12). After Mr. Duchardt's memory was refreshed with the juvenile court record, he testified that he requested a mental evaluation of petitioner and that the juvenile court denied the request.[8] (R.24 Tr. at 626-

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[8] On direct examination, Mr. Duchardt had testified that he did not request a psychiatric evaluation of petitioner in the juvenile court. (R.29 Tr.

28). Mr. Duchardt stated that he has always believed that petitioner was not competent to proceed, to waive his right to counsel, or to plead guilty. (R.24 Tr. at 637, 655). Mr. Duchardt testified that, in his opinion, petitioner's decisions to waive his right to counsel, plead guilty and seek the death penalty were not rational, voluntary, intelligent decisions made after an intelligent weighing of the alternatives. (R.24 Tr. at 642).

The State next called Dr. Mandracchia, who examined petitioner in November 1985 to determine petitioner's competency to stand trial. (R.24 Tr. at 736). Dr. Mandracchia was again asked if he believed petitioner was competent to proceed. (R.24 Tr. at 741). Mr. Mandracchia responded that his examination had revealed no evidence of a mental disease or defect that excluded petitioner from proceeding. (R.24 Tr. at 741).

Dr. Mandracchia was also asked, for the first time, if he could render an opinion as to whether petitioner was competent to waive his right to counsel. (R.24 Tr. at 812). Dr. Mandracchia responded that he did not assess petitioner's ability to waive counsel and could not render an opinion on the subject. (R.24 Tr. at 812-13). The State rested after Dr. Mandracchia's testimony. (R.24 Tr. at 817).

The court convened to hear argument in the case the following morning. (R.24 Tr. at 818). The State, however, moved to continue the case for one week. (R.24 Tr. at 818-19). The State informed the court that it was surprised by Dr. Mandracchia's response concerning petitioner's competency to waive his right to counsel. (R.24 Tr. at 819). The State requested that

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at 618).

Dr. Mandracchia be permitted to re-examine petitioner and moved to reopen its case to hear Dr. Mandracchia's testimony on the issue. (R.24 Tr. at 819).

Petitioner's counsel strenuously objected to the State's requests on several grounds. (R.24 Tr. at 820-23, 828-31, 832-34, 835-38, 839-40). The court granted the State's motions and ordered Dr. Mandracchia to conduct a psychological evaluation of petitioner. (R.24 Tr. at 839).

The court reconvened the hearing on June 5, 1989. Dr. Mandracchia had not yet arrived to testify, so petitioner called Dr. Parwatikar, his rebuttal witness, first. (R.24 Tr. at 843-44). Dr. Parwatikar had performed the evaluation of petitioner ordered by the Supreme Court of Missouri in October of 1986 to determine if petitioner was competent to waive his right to counsel on appeal. (R.24 Tr. at 846-48). Dr. Parwatikar testified that his evaluation of petitioner consisted of a two and one-half hour interview and a review of the case transcripts, psychiatric reports and petitioner's records. (R.24 Tr. at 847-48). Dr. Parwatikar stated that he concluded, and informed the Supreme Court of Missouri, that petitioner was not competent to waive his right to counsel. (R.24 Tr. at 848-49).

Dr. Parwatikar believed petitioner had the cognitive ability to understand the proceedings against him, but that he suffered from a mental disorder which rendered him incapable of deciding to waive his right to counsel through appropriate reasoning. (R.24 Tr. at 850-52). Dr. Parwatikar also testified that petitioner was not competent to waive his right to counsel in early

1986, when he was initially allowed to waive counsel and plead guilty. (R.24 Tr. at 857).

The State then recalled Dr. Mandracchia. (R.24 Tr. at 890). Dr. Mandracchia testified that, pursuant to the court's order, he performed another psychological evaluation of petitioner. (R.24 Tr. at 891-92). Dr. Mandracchia testified he had interviewed petitioner for seven to eight hours over a two-day period and reviewed the psychiatric reports and petitioner's records. (R.24 Tr. at 891-92). Dr. Mandracchia stated that, in his opinion, petitioner waived his right to counsel knowingly, but not intelligently or voluntarily. (R.24 Tr. at 893).

Dr. Mandracchia believed petitioner was able to waive his right to counsel knowingly because he understood who his counsel was and that the waiver meant he chose not to have counsel assist him. (R.24 Tr. at 893-94). Dr. Mandracchia believed petitioner was not able to waive his right to counsel voluntarily because he was coerced, in an interpsychic or intrapersonal sense, by an irrational, overriding fear of long-term incarceration. (R.24 Tr. at 894-96, 903). Dr. Mandracchia believed petitioner was not able to waive his right to counsel intelligently because petitioner simply did not consider any option other than death. (R.24 Tr. at 897). Dr. Mandracchia stated that petitioner did not engage in a true decision-making process, but that he made the decision with the perspective that there were no alternatives. (R.24 Tr. at 900). Dr. Mandracchia believed that once petitioner began to seek the death penalty, all other decisions, including the decision to waive his right to counsel, were simply methods to achieve his goal of being sentenced to death. (R.24 Tr. at 898-99).

Dr. Mandracchia provided the court with a written report of his findings. (R.24 Tr. at 901). In addition to his findings concerning petitioner's waiver of his right to counsel, the report stated that petitioner's decisions to plead guilty and to waive the right to offer evidence in mitigation of sentence were made knowingly, but not voluntarily or intelligently. (State's Ex. 33). Therefore, the report stated, petitioner was not competent to make these decisions. (State's Ex. 33).

The State rested after Dr. Mandracchia's testimony. (R.24 Tr. at 901). The court then heard argument from counsel and ordered the parties to submit proposed findings of fact and conclusions of law. (R.24 Tr. at 907-84). On July 26, 1989, the court denied petitioner's motion. (Legal File at 113). The court found the psychiatrists' and psychologists' testimony "unpersuasive" and found that petitioner "knowingly, voluntarily, intelligently, and competently waived his right to counsel." (Legal File at 92-93).

Petitioner filed an appeal in the Missouri Court of Apeals, Western District. (Legal File at 115). After the appeal was transferred to the Supreme Court of Missouri, the court affirmed the denial. Wilkins v. State, 802 S.W.2d 491 (Mo. banc 1991). On the issue of the sentencing court's finding that petitioner was competent to waive his right to counsel, the court held that the sentencing "court may reject any witnesses' testimony though no contrary evidence is offered." Id. at 501. Petitioner's writ of certiorari was denied by the Supreme Court of the United States. Wilkins v. Missouri, 502 U.S. 841 (1991).

II. Analysis

Petitioner contends he was denied his right to counsel under the Sixth and Fourteenth Amendments because he was not competent to waive the right and because the waiver was not knowingly, voluntarily or intelligently made.[9] The State argues that the sentencing court's finding that petitioner's waiver of his right to counsel was made competently, intelligently, knowingly and voluntarily is well-supported and should not be disturbed by this Court.

On habeas review of a state conviction, this Court accords a presumption of correctness to state court findings of fact. 28 U.S.C. §2254(d). Section 2254(d) provides eight exceptions to this presumption. One of the exceptions exists if this Court concludes that a factual determination is not "fairly supported by the record." 28 U.S.C. §2254(d)(8).

Whether a defendant has voluntarily waived rights guaranteed by the Federal Constitution is a question of federal law, and not a question of fact subject to the requirements of Section 2254(d). Marshall v. Loneberger, 459 U.S. 422, 432 (1983). However, underlying questions of fact relating to the legal issue are questions of fact for purposes of Section 2254(d). Id. at 431-32; see also Demosthenes v. Baal, 495 U.S. 731, 7335 (1990) (state court's finding regarding a defendant's competency is entitled to Section 2254(d) presumption). Accordingly, the issue before this Court is whether the state court's findings

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[9] Petitioner raises numerous other claims, however, because the Court holds that petitioner's right to counsel was violated, the other claims will not be addressed.

with regard to petitioner's waiver of his right to counsel are fairly supported by the record.

The Sixth and Fourteenth Amendments guarantee a criminal defendant in a state proceeding the right to counsel. Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963). In determining whether there has been a valid waiver of right to counsel, courts must "indulge every reasonable presumption against waiver." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)). "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson, 304 U.S. at 465. "To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand." Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948). "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson, 304 U.S. at 464.

In Godinez v. Moran, 113 S. Ct. 2680 (1993), the Supreme Court of the United States announced the competency standard for waiving the right to counsel and pleading guilty. The Court granted certiorari on the issue of whether the competency standard for waiving these rights was higher than the competency standard

for standing trial. Id. at 2684-85. The Court stated that the standard for competence to stand trial is "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.'" Id. at 2685 (quoting Dusky v. United States, 362 U.S. 402 (1960 (per curiam)). The Court held that the standard for competence to waive the right to counsel or plead guilty is not higher. Godinez, 113 S. Ct. at 2686. Thus, a defendant who is competent to stand trial is competent to waive the right to counsel and plead guilty.

"A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary." Godinez, 113 S. Ct. at 2687 (citing Parke v. Raley, 113 S. Ct. 517, 523 (1992) (The standard is whether the waiver represents a voluntary and intelligent choice among the alternative courses of action open to the defendant), and Faretta v. California, 422 U.S. 806, 835 (1975) (accused must "knowingly and intelligently" forego benefits of right to counsel)).

The Godinez Court held that, "[i]n this sense there is a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence." Godinez, 113 S.Ct. at 2687 (emphasis in original). The Court explained that the "focus of a competency inquiry is the defendant's mental capacity; the question is whether he

has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id. at 2687 n.12 (emphasis in original) (citations omitted).

Petitioner first argues that he was not competent to waive his right to counsel. The State contends that the record supports the sentencing court's determination that petitioner was competent to stand trial. Thus, the State argues, under Godinez, petitioner was competent to waive his right to counsel. This Court agrees. Dr. Mandracchia's testimony on the issue of competency to stand trial appears to constitute "fair support" for the court's finding that petitioner was competent to stand trial. Accordingly, the record fairly supports the sentencing court's finding that petitioner was competent to waive his right to counsel as well.

Petitioner next argues that the sentencing court's finding that he knowingly, intelligently and voluntarily waived his right to counsel is erroneous. The State contends the record supports the court's findings on this issue.

After an exhaustive review of the more than fifteen hundred pages of transcript of the state court proceedings, this Court has reached the inescapable conclusion that the sentencing court's finding that petitioner intelligently and voluntarily waived his right to counsel is not fairly supported by the record. Rather, all the evidence on the record contradicts the finding.

The Court first considers the conclusions of Dr. Mandracchia, the State's primary witness and the only psychiatrist or psychologist to examine petitioner prior to and after the relevant period of time. After his extensive re-evaluation of petitioner, Dr. Mandracchia concluded that petitioner could not intelligently or voluntarily waive his right to counsel.[10] Dr. Mandracchia believed petitioner was not able to waive the right voluntarily because he was coerced, in an interpsychic or intrapersonal sense, by an irrational, overriding fear of long-term incarceration. Dr. Mandracchia believed petitioner was unable to waive his right to counsel intelligently because petitioner simply did not consider any option other than death. Dr. Mandracchia stated that petitioner did not engage in a true decision-making process, but that he made the decision with the perspective that there were no alternatives.

Dr. Logan's conclusions were very similar to Dr. Mandracchia's. Dr. Logan testified that petitioner possessed cognitive ability, but, due to his psychiatric condition, he made decisions without truly considering the consequences. Dr. Parwatikar also believed petitioner possessed the cognitive ability to understand

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[10] Dr. Mandracchia also stated petitioner knowingly waived his right to counsel, but he based this opinion on the fact that petitioner knew who his counsel was and that the waiver meant he chose not to have counsel assist him. This level of awareness obviously does not satisfy the "knowingly" standard described by the Godinez Court as requiring that the defendant actually understands the significance and consequences of his decisions. Dr. Mandracchia's use of "intelligently" does appear to be consistent with the constitutional standard.

the proceedings, but concluded that petitioner's mental disorder rendered him incapable of making the decision to waive his right to counsel through appropriate reasoning.

Dr. O'Connor testified that petitioner suffered from a mental illness which severely impaired his ability to anticipate consequences and use judgment. After reviewing the results of the M.M.P.I. originally administered to petitioner by Dr. Mandracchia, Dr. O'Connor offered a more specific opinion. Dr. O'Connor testified that petitioner was not able to make a knowing, intelligent, voluntary and rational choice between the alternatives available to him at the time he pled guilty.[11]

Thus, every single psychiatrist and psychologist answering the question, including the two state doctors examining petitioner pursuant to orders from state courts, concluded that petitioner could not intelligently or voluntarily waive his right to counsel. The State offered absolutely no evidence that petitioner was capable of intelligently and voluntarily waiving his right to counsel. The State's only evidence in the Rule 24.035 hearing consisted of two witnesses who, on this

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[11] Dr. Lewis and Dr. Pincus both testified that petitioner suffered from a mental disorder rendering him incompetent to stand trial or waive his right to counsel, but were not specifically asked about petitioner's ability to knowingly, intelligently or voluntarily make the decision to waive his rights.

issue, testified to the exact opposite of that expected by the State.[12]

The State contends that the record supports the sentencing court's finding because the sentencing court thoroughly advised petitioner of his constitutional rights and the dangers of waiving them. The trial court did fully inform petitioner of the various rights he was waiving and disadvantages of waiving those rights. However, the knowingly and voluntarily prong of the Godinez standard clearly requires more than merely exposing a defendant to information--it requires that "the defendant actually does understand the significance and consequences of a particular decision." Godinez, 113 S. Ct. at 2687 n.12. Every psychiatrist and psychologist that offered testimony on the issue concluded that petitioner suffered from a mental disorder that prevented him from possessing such an understanding. In light of the undisputed psychiatric opinion, the fact that the sentencing court informed petitioner of his rights is of little consequence.

The State argues that the sentencing court's otherwise sufficient colloquy with petitioner concerning his rights cannot be rendered deficient simply because

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[12] The State apparently expected Fred Duchardt to testify that he did not ask the juvenile court for a psychiatric evaluation to determine competency because he did not feel such an evaluation was necessary. (R.24 Tr. at 618). The State also expected Dr. Mandracchia to testify that petitioner could intelligently and voluntarily waive his right to counsel. (R.24 Tr. at 819).

petitioner suffered from a mental disorder.[13] In essence, the State contends that the petitioner's mental disorder is not relevant to whether he knowingly and voluntarily waived his rights as long as the court fully informed petitioner. This Court disagrees. Clearly, a defendant's mental condition is relevant to his ability to truly knowingly and voluntarily waive his constitutional rights. This proposition is supported by common sense as well as the extensive psychiatric testimony in this case.

Two Circuit Court of Appeals' cases decided since Godinez recognize that a mental condition is relevant to whether the defendant knowingly and voluntarily waives constitutional rights. In United States v. Cash, 47 F.3d 1083 (11th Cir. 1995), the issue before the Eleventh Circuit was whether the defendant's waiver of his right to counsel had been knowing, voluntary and intelligent. Id. at 1088. The trial court had found the defendant competent to stand trial and allowed him to waive his right to counsel. Id. at 1086-87. On appeal of his conviction, the defendant did not argue that he was not competent to waive his right to counsel, but argued that the waiver of the right was not knowing, voluntary and intelligent. Id. at 1089 n.3. The Eleventh Circuit concluded that, in light of the defendant's mental disorder, it was questionable whether the defendant actually possessed the information necessary to make

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[13] The State also argues that, if a mental disorder is relevant to the issue, this is a new rule under Teague v. Lane, 489 U.S. 288 (1989). The Court disagrees. The Godinez decision did not impose or alter the requirement that a defendant must knowingly and voluntarily waive constitutional rights.

a knowing, voluntary and intelligent waiver.[14] Id. at 1090. See also Weisberg v. State of Minnesota, 29 F.2d 1271, 1278 (8th Cir. 1994) (letter from psychologist, while found to be ambivalent and thus unpersuasive, was relevant to whether defendant knowingly and voluntarily entered guilty plea). The State's assertion that petitioner's mental impairment is not relevant to whether he knowingly, intelligently and voluntarily waived his right to counsel is without merit.

III. Conclusion

This Court holds that the state court's finding that petitioner intelligently and voluntarily waived his right to counsel is not fairly supported by the record. Accordingly, the finding is not entitled to the presumption of correctness under Section 2254(d).

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[14] The court noted that, had the trial court engaged the defendant in a more searching colloquy, the government might have met its burden of showing that the defendant knowingly, voluntarily and intelligently waived his right to counsel. Cash, 47 F.3d at 1090. A more searching discussion could remedy the error in Cash because the defendant's mental disorder was such that it caused him to overestimate and overstate his abilities. Id. In the case at bar, petitioner's mental disorder apparently prevents him from understanding the significance and consequences of his decisions. Thus, an extensive discussion with petitioner could not satisfy the requirement. This Court cites Cash only for the proposition that a defendant's mental disorder is relevant in determining whether he is able to knowingly, intelligently and voluntarily waive his right to counsel.

The Court holds that petitioner was denied his right to counsel guaranteed by the Sixth and Fourteenth Amendments. Petitioner is therefore in custody in violation of the Constitution of the United States. Petitioner's petition for writ of habeas corpus will be conditionally granted.

It is hereby

ORDERED that Heath A. Wilkins' First Amended Petition for Writ of Habeas Corpus is conditionally granted. This conditional issuance of the writ shall be unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this Order.

(signature)

SCOTT O. WRIGHT
Senior United States District Judge

May 16, 1995

United States District Court
WESTERN DISTRICT OF MISSOURI

HEATH A. WILKINS,
Petitioner,

JUDGMENT IN A CIVIL CASE

CASE NO. 91-0861-CV-W-5

v.

PAUL K. DELO,
Respondent.

____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Heath A. Wilkins' First Amended Petition for Writ of Habeas Corpus is conditionally granted. This conditional issuance of the writ shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this Order.

May 18, 1995 R.F. Connor

Date *Clerk*

Entered on May 18, 1995
C. Morrison (signature)
(By) Deputy Clerk

Supreme Court of Missouri
en banc

HEATH A. WILKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 71936
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF
CLAY COUNTY, MISSOURI
Honorable Glennon E. McFarland, Judge

Appeal from the hearing court's denial of defendant's Rule 24.035 motion. We affirm.

Defendant was sentenced to death for the murder of Nancy Allen during the robbery of a convenience store in Avondale, Missouri. The conviction and sentence were affirmed in *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987), and reaffirmed in the United States Supreme Court. *Stanford v. Kentucky*[1], 492 U.S. ___, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). He now seeks postconviction relief presenting fourteen points of alleged error.

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[1]Defendant's case was consolidated with *Stanford v. Kentucky*, a case also involving a minor sentenced to death.

The operative facts of the crime may be found in 736 S.W.2d 409, 411-412, detailing Wilkins' vicious conduct which when coupled with other relevant evidence warranted the sentence of death. The record discloses that pursuant to a prearranged plan defendant and an accomplice murdered the helpless victim Nancy Allen. She was killed when seized by the accomplice and defendant

> thrust his knife into her back. Defendant said he was aiming at the kidneys, which he thought would be a fatal wound.
>
> Nancy Allen fell face down onto the floor. However, she rolled into a spread-eagled position with her back on the floor. Stevens [the accomplice] could not find everything that he wanted to take and could not operate the cash register. He asked defendant what to do. Nancy Allen replied, directing Stevens to what he sought but this caused defendant to stab his helpless victim three more times in her chest. Two of these pierced her heart. She continued to speak, begging for her life. Defendant silenced her with four stabs into the neck, one of which opened the carotid artery.
>
> As Nancy Allen's pierced heart oozed its life's blood into the opened cavities of her lungs and onto the floor, defendant and Stevens gathered up cash and merchandise and left the store. Defendant wiped fingerprints off the door

handle before leaving. They stuffed the stolen items in the bag outside and left. Nancy Allen lay dying on the floor.

736 S.W.2d at 412.

On August 10, 1985, defendant, then 16 years of age, was arrested with his accomplices in Kansas City, about two weeks following the murder. He was taken to the police station where he was advised of his rights and in the presence of his mother and a juvenile officer was interrogated by a police officer. Defendant confessed his part in the crimes describing in detail the planning and execution of both the robbery and murder.

On August 12, Mr. Fred Duchardt of the Clay County Public Defender's Office was appointed defense counsel and on August 15, a certification hearing was conducted in the juvenile court to determine whether defendant should stand trial as an adult. The evidence included defendant's medical and juvenile records and pursuant to §211.071, RSMo Supp. 1984, the court certified that defendant could be tried as an adult.

On October 8, defendant was charged by information with first degree murder, armed criminal action and unlawful use of a weapon. Represented by Duchardt, defendant was arraigned in circuit court of Clay County on October 17 and entered a plea of not guilty or "not guilty by reason of mental disease or defect excluding responsibility" to all three charges. The circuit judge ordered a mental examination of defendant by the Western Missouri Mental Health Center which was conducted by a Dr. Steven Mandracchia on November 27. Mandracchia's reports containing the results of his examination were filed with

the circuit court the following month and shortly thereafter defendant obtained an additional mental examination at his expense.

Sometime later, defendant confided to his attorney that he wished to withdraw his pleas of not guilty, enter pleas of guilty to all charges and seek the death sentence for the murder of Nancy Allen. Defendant's decision apparently grew from his realization that the evidence against him was overwhelming and it also appears he experienced some remorse for his acts. Most importantly his prior experience in various institutions convinced him that death would be preferable as he harbored a firm mindset against incarceration for the rest of his life.

In March of 1986, defendant was examined at his expense at the Menninger Foundation and the results of that examination became available in April. On April 16, a hearing was conducted before the Honorable Glennon McFarland in the Circuit Court of Clay County to determine defendant's competency at the time of the act as well as his competency to stand trial. The first witness, Dr. Mandracchia, stated unequivocally "there was no evidence of mental disease or defect as defined by Chapter 552 of the revised statutes of the state of Missouri" and that defendant was "competent to proceed." Dr. Mandracchia had examined defendant before learning that he reversed his position and intended to plead guilty and seek the death penalty. However, on being advised of defendant's changed intention, Mandracchia remained of the same opinion and testified, "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities." The next witness, Dr. W.S. Logan, director of Law and Psychiatry at Menninger, who examined defendant in

March, declined to state whether he felt defendant was competent to proceed to trial; rather, he testified defendant had average intelligence, understood the charges against him, the array of possible pleas open to him, the range of punishment, and could cooperate with his attorney. Logan, however, opined that defendant was proceeding under several errors of fact and was acting impulsively and had not thought through the consequences of his decisions. Though Logan testified that defendant suffered from some "emotional impairment where he would not be acting in necessarily his own best interests," he characterized "the execution of the crime as very purposeful, very deliberate, very well planned . . . [with defendant making] numerous efforts to avoid detection, showing that he appreciated the wrongfulness of it . . ."

At the close of the hearing, the court determined that defendant was competent to stand trial and at that point, Duchardt advised the court that defendant had asked him to withdraw as counsel and allow defendant to proceed pro se because Duchardt would not aid him in seeking the death penalty. The court questioned defendant as to his age, education, understanding of his right to counsel, and his motives for waiving counsel. The record is replete with the court's and counsels' careful, complete and detailed appraisal of defendant's right to and the need for counsel, with discussions centering on his situation and the gravity of the crimes. Judge McFarland refusing to rule defendant's motion to waive counsel and proceed pro se, continued the cause allowing defendant further opportunity to reconsider.

On April 23, the hearings resumed and again the court conducted careful questioning of defendant and in a lengthy conversation with him emphasized his right to

counsel and the benefits of such service. Defendant nevertheless executed written waiver of counsel, §600.051, RSMo 1986, and the court again inquired at length making absolutely sure that defendant understood the range of punishment for each crime. Further he informed defendant that if at any time he wished the service of counsel he would be immediately accommodated and Mr. Duchardt was directed to remain in the courtroom to act in an advisory capacity if defendant had any questions or decided to allow Duchardt to once more represent him. Additionally, the court attempted to dissuade defendant informing him he felt the decision to plead guilty and seek the death penalty was a poor one; stressing repeatedly the seriousness of defendant's intended actions, the court emphasized that point by describing the horrors of dying by lethal gas. Defendant acknowledged the court's concerns, but stood fast in his decision and the cause was again continued, this time until May 9, with Judge McFarland urging defendant to reconsider and think "fully" about his decision.

On April 29, prior to the plea hearing, defendant was brought before the court and given the waiver and guilty plea forms for all three charges. Defendant resolutely repeated his announced intention to plead guilty and waive his right to trial by jury.

On May 9, the defendant again came before the court with Duchardt present in his role as "standby" counsel, and the court again encouraged defendant to accept Duchardt as his counsel, but to no avail. Judge McFarland warned defendant that if he pleaded guilty to first degree murder the court "very probably" would sentence him to death. Defendant acknowledged that he understood this and only then did the court conduct

the requisite examination prefatory to acceptance of a guilty plea. In this examination, the Defendant stated he knew the range of pleas, punishments and rights to which he was entitled and asserted he had not been influenced by anyone else in his decision. Going further, he described the crimes and his part in their commission. The court accepted the pleas of guilty to all charges, including murder in the first degree; however, he informed defendant that should he change his mind and wish to withdraw his guilty pleas before the scheduled June 27 sentencing hearing, the court would consider such request. The court's last words to defendant at this hearing were that during the next month or so if he wished to be represented, the court would appoint an attorney for him. The defendant responded that he understood his rights.

At the June 27 sentencing hearing, defendant appeared with Duchardt present in the courtroom still in his advisory role. The court again recommended that defendant accept Duchardt's services as counsel but defendant declined and Judge McFarland assessed the maximum sentences for the lesser crimes. As to the first degree murder charge, the court first reiterated that defendant had the right to remain silent at his penalty phase of the trial, had a right to a jury at this stage and a right to counsel and encouraged him to reconsider. Defendant responded that he understood all this but wished to waive such rights. The court then offered defendant one last chance to withdraw his plea of guilty to first degree murder and again defendant declined informing the court he wished to proceed as previously stated.

Evidence was taken including defendant's incriminating statements given to the police on August

10, 1985, the testimony of the victim's husband, Robert Allen, several persons who had had contact with the defendant during his stays at various juvenile centers, and the testimony of Doctors Mandracchia and Logan. Considerable portions of defendant's juvenile records offered by the State were kept out by the sustained objections of the defendant himself. Then defendant called and attempted to elicit testimony of Patrick Stevens, alleged by defendant as an accomplice in the robbery. However, Stevens asserted his Fifth Amendment right against self-incrimination and refused to answer defendant's questions. In his closing comments to the court, the defendant stated he wished the court to consider all the harm he had done and the fact that he preferred death as against imprisonment.

The court entered its order assessing the punishment at death for the murder of Nancy Allen. In determining that the death penalty was warranted, the court found the following aggravating circumstances: "Number One, the murder in the first degree was committed while the Defendant was engaged in the perpetration of the felony of robbery, and, Number Two, the murder in the first degree involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman."

Defendant took no steps to appeal his sentences, however this Court on its own motion directed the State Public Defender to enter the case as amicus curiae and brief all issues within the purview of this Court's reviewing power under §565.035.1, RSMo 1986. On October 3, 1986, defendant and the attorneys for the amicus curiae appeared before this Court. At the conclusion of the arguments by the State and amicus curiae attorneys, defendant addressed the Court taking

issue with several of the public defenders' comments, in which it was stated that defendant was incompetent at the time of the crime, at the time of the trial and at the hearings. Defendant stated he was competent at all times and made a rational decision to seek the death penalty for his crime.

This Court ordered that defendant be examined by Dr. Parwatikar of the Malcom Bliss Mental Health Center to determine if he was competent to waive his right to counsel on appeal. On December 31, Dr. Parwatikar's report was filed with this Court stating that defendant suffered from a mental disorder which made him incompetent "to waive his Constitutional Rights and represent himself in front of the [c]ourt." The report further stated that the defendant was competent to aid and cooperate with any attorney who may be appointed for him. On this information, appellate counsel was appointed, new briefs were submitted and new oral arguments heard.

Sometime after the decision of this Court in September 1987, affirming the conviction and sentence, defendant's position changed. On June 28th, 1988, defendant filed in circuit court his pro se Rule 24.035 motion seeking postconviction relief. This motion was amended first on August 28 and again on May 16, 1989, with the filing of a fifty-page motion. A hearing on the amended motions was conducted by Judge McFarland during the period May 22-26, and concluding on June 5, 1989, in which the defendant called five doctors who testified concerning his competence. The State presented two witnesses, Mr. Duchardt and Dr. Mandracchia. The transcript of this proceeding contains almost one thousand pages and more than 600 pages of exhibits and on July 26, the court denied defendant's

motions. This appeal followed. Our review is limited to a determination of whether the hearing court's findings and conclusions are clearly erroneous. Rule 24.035(j).

The first of defendant's fourteen points is that Mr. Duchardt, while acting as his counsel in the juvenile certification proceedings, provided ineffective assistance by not requesting a mental evaluation. Procedurally, defendant is barred from raising the issue of his juvenile counsel's effectiveness. This Court in *Jefferson v. State*, 442 S.W.2d 6 (Mo. 1969), held that a defendant who has been transferred from the jurisdiction of the juvenile court to a court of general law may attack the juvenile proceedings either by a motion in the circuit court requesting dismissal of the information or seeking a remand to the juvenile court for a proper hearing. *Id.* at 12. Failure so to do constitutes a complete waiver of any objection tot he juvenile proceedings. *Id.*

In *State v. Abbott*, 654 S.W.2d 260 (Mo. App. 1983), defendant on direct appeal challenged the effectiveness of counsel before the juvenile court in a §211.071, RSMo 1978 proceeding, which resulted in defendant's certification for trial as an adult. Defendant charged that counsel had a "conflict of interest" which denied defendant full and adequate representation at the certification hearing but the court of appeals dismissed the point for defendant's failure to raise his objections to the juvenile proceedings before the trial court; such failure constituted a waiver of those complaints. This bar applies whether the defendant is seeking to raise the defects by direct appeal or in proceedings. *Richardson v. State*, 555 S.W.2d 83, 87

(Mo. 1977).[2] Further, it applies to alleged constitutional claims, *Ford v. State*, 534 S.W.2d 111, 112-113 (Mo. App. 1976), and to a minor defendant who waives objection to the juvenile court adjudication of suitability for prosecution by a subsequent voluntary plea of guilty in the criminal court. *Haliburton v. State*, 617 S.W.2d 417, 419 (Mo. App. 1981).

Even if defendant's claim were preserved for consideration, it would be unavailing. After a guilty plea, counsel's effectiveness is only relevant in a motion for postconviction relief to the extent it affects the voluntariness of the movant's plea. *Troupe v. State*, 766 S.W.2D 722, 723 (Mo. App. 1989). This requires that the defendant prove his counsel's performance was deficient and that prejudice resulted from the deficiency. *Sidebottom v. State*, 781 S.W.2D 791, 795 (Mo. banc 1989). Prejudice is shown by proof that but for counsel's unprofessional errors, there was a reasonable probability the result would have been different. *Id.* at 796.

Nothing in defendant's briefs or arguments discloses that counsel's alleged shortcomings before the juvenile court affected the voluntariness of his guilty plea. Indeed, defendant not only pleaded guilty to first degree murder but actively sought the death sentence. He was not acting under some mistaken belief or misunderstanding caused by Duchardt's representation. Further defendant's allegation that failure to request a mental examination by the juvenile court constituted ineffective assistance of counsel is meritless. We note

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[2]Although *Richardson* involved a Rule 27.26 proceeding, the procedural bar equally applies to motions under Rule 24.035.

that testimony from the Rule 24.035 hearing showed that the juvenile court had before it the complete documentation of defendant's previous institutionalization and various medical and psychiatric reports on the defendant. The juvenile court was, from its consideration of these reports and documents, aware of defendant's past mental problems. Failure to request a mental examination at this juncture cannot be said to indicate conduct rising to a level of ineffectiveness which subverted defendant's constitutional rights.

Defendant next asserts his conviction and sentence violates due process rights secured under the United States and Missouri constitutions and is violative of the Eighth Amendment's prohibition against cruel and unusual punishment in that he was "incompetent as a matter of law." On direct review counsel raised the issue of defendant's competency to stand trial and this Court rejected that challenge. *State v. Wilkins*, 736 S.W.2D at 415. Postconviction rule proceedings are not available as a vehicle to obtain a second appellate review of matters raised on direct appeal. *Arbeiter v. State*, 738 S.W.2D 515, 516 (Mo. App. 1987). Accordingly, this contention is denied.

Defendant for his third point alleges that Duchardt rendered ineffective assistance of counsel during defendant's murder trial in that he called an adverse witness to testify against defendant; failed to cross-examine this adverse witness; failed to present contrary medical testimony as to defendant's mental state; abandoned defendant during the trial; failed to object to the court's finding that defendant was competent to proceed; and failed to investigate the law and facts pertaining to the defendant's competence to proceed pro se.

As previously noted, for a defendant to succeed on a claim of ineffective assistance of counsel, he must demonstrate that counsel's performance was both deficient and prejudicial. *Hill v. Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In this case involving a guilty plea, our review is to determine whether counsel's alleged deficiencies affected the voluntariness of the plea. *Troupe v. State*, 766 S.W.2d 722, 723 (Mo. App. 1989).

The first instance of alleged ineffective assistance of counsel occurred when, during the competency hearing, Mandracchia testified that defendant was competent to proceed.

To address this issue we must reexamine the setting. At the arraignment, Duchardt entered a plea of not guilty and not guilty by reason of mental disease or defect on behalf of defendant. Voicing concern as to his client's competency to proceed, Duchardt requested that he be mentally examined. This motion was granted and defendant was examined by Dr. Mandracchia of the Western Missouri Mental Health Center. On receipt of Mandracchia's report, December 23, 1985, the defendant's counsel moved for an additional mental examination at defendant's expense. This too was granted and the additional examination was performed by Dr. Logan of the Menniger Foundation. At defendant's competency hearing, Duchardt called Mandracchia as his first witness who testified that in his opinion "there was no evidence of mental disease or defect as defined by Chapter 552 of the Revised Statutes of the State of Missouri" and that he felt that the Defendant had no "psychological, intellectual or cognitive limitations on his capabilities." On cross-

examination, he stated the defendant was competent to plead guilty or not guilty to the crimes charged.

Defendant's claim of ineffective assistance fails to disclose any prejudice from counsel's action of calling Mandracchia. The examination of defendant and the subsequent hearing were held in accordance with §552.020, RSMo Supp. 1985. Under §552.020.2, Mandracchia's report was filed with the trial court within sixty days following the order for the examination, and pursuant to §552.020.5, copies were delivered to the defense and the prosecution. The purpose is to provide equal access to testimony establishing or refuting medical defense, *State v. Meeks*, 655 S.W.2D 536, 539 (Mo. App. 1983), and this access is a matter of right. *State ex rel. Jordon v. Mehan*, 597 S.W.2D 724, 726 (Mo. App. 1980). Mandracchia's oral testimony was consistent with his report which the parties had in hand and had defense counsel not called Mandracchia beyond question the prosecution would have produced him as a witness. The point is denied.

Defendant's second subpoint charges that Duchardt was ineffective for not cross-examining Mandracchia as to the objective basis for his testing of defendant. Some four years later in the Rule 24.035 hearing, motion counsel cross-examined Mandracchia on the basis of his testing of defendant and discovered that he was unaware or had forgotten several aspects of Defendant's background, including certain hallucinations as a child. However, defendant again has failed to establish prejudice. We note that Mandracchia's competency report lists all documents used as his sources of information on defendant and a review of those items reveals the doctor had employed the very documents which defendant now claims that he

never read. At the Rule 24.035 hearing, held nearly four years after the report was made, Dr. Mandracchia understandably experienced some difficulty remembering all the documents he had used for the initial examination and it has not been shown that cross-examination of the sort defendant now urges would have been productive.

Mistakenly, defendant suggests *Miller v. State*, 498 S.W.2D 79 (Mo. App. 1973), is controlling here. In *Miller*, the court of appeals decided that an attorney who believed his client incompetent to proceed to trial but failed in part to contest the report of the medical examiner and subject that examiner to cross-examination at a competency hearing, had rendered ineffective assistance of counsel. *Id.* at 87. However, two factors distinguish *Miller* from the case before us. There, counsel advised defendant to plead guilty and waive many of his constitutional rights; in contrast, Duchardt consistently counseled against defendant's wish to plead guilty and seek the death sentence. In *Miller*, counsel appears to have remained silent until the postconviction hearing as to his reservations concerning defendant's competency, while Mr. Duchardt argued from the first day that he felt defendant was incompetent to proceed and it was he who sought a second examination to refute the Mandracchia report. Counsel's service to defendant at the competency hearing did not fall below accepted norms.

Defendant next asserts that counsel was ineffective for not offering certain testimony of Dr. Logan that Defendant was incapable of proceeding without counsel. At the competency hearing Logan testified as to his diagnosis of defendant's mental health, but would not give a definitive statement concerning defendant's

competence as defined in Chapter 552. However, at the postconviction motion hearing, Logan testified he found defendant definitively incompetent to proceed as his own counsel. Defendant now asserts this later piece of evidence should have been elicited. Again defendant fails to demonstrate a nexus between counsel's action and the voluntariness of his guilty plea. Duchardt devoted nearly four months attempting to turn defendant from the course he determined to take. Defendant himself advised the court that Mr. Duchardt informed him of available pleas, punishments and defenses, and had repeatedly attempted to dissuade him from his intended action. Mr. Duchardt as counsel[3] performed properly and defendant fails to state how his conduct either as active or "standby" counsel affected the voluntariness of defendant's plea. This failure is fatal to the contention. *Troupe v. State*, 766 S.W.2d at 723.

Defendant's fourth subpoint alleges that Duchardt was ineffective for "abandoning" defendant during the trial. In effect, defendant insists that counsel should some how have forced his services upon defendant. We can but sympathize with Duchardt for the dilemma in which he found himself. Defendant for some months prior to trial had repeatedly stated he intended to plead guilty and seek the death penalty; he insisted that Duchardt aid him in that quest and not attempt to thwart his plan. Duchardt felt he could not aid defendant in

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[3]As previously discussed, Duchardt was requested by the court to remain in the courtroom during all stages of defendant's trial and to be available for any questions that defendant may have had and act as "standby" counsel should defendant change his mind and wish representation by counsel.

this purpose and a conflict had arisen between attorney and client.

Defendant asserts that under the rules of Professional Conduct, Duchardt had a duty not to "abandon" his client or at a minimum should have sought the appointment of a guardian ad litem to represent the defendant's interest after Duchardt was dismissed as counsel. Several flaws are readily apparent in these assertions. First, Duchardt did not "abandon" his client by moving to withdraw as counsel. As we read the record, it was defendant who by pro se motion sought Duchardt's removal, and it must be emphasized that if not satisfied defendant had a right to discharge his lawyer. *Allen v. Fewel*, 337 Mo. 955, 87 S.W.2d 142, 145 (banc 1935). Defendant could not have been forced to accept Duchardt's representation. *State v. Thomas*, 625 S.W.2d 115, 124 (Mo. 1981).

Additionally, the term "abandon" connotes a complete withdrawal or walking away from the client without the client having a reasonable opportunity to obtain the service of other counsel. Such did not occur in this case. Even after defendant insisted he be dismissed Duchardt by direction of the court remained available to Defendant at every stage of the proceedings and was present in the courtroom throughout the trial. During interim periods, Duchardt was accessible to assist defendant with any legal question. Apparently defendant availed himself of this service by contacting Duchardt on several occasions and, in the penalty phase, defendant called upon Duchardt to speak on his behalf and to handle certain evidentiary objections that defendant wished to make. Mr. Duchardt's role is not without precedent and closely resembles the situation in *State v. Rollie*, 585 S.W.2d

78 (Mo. App. 1979), where the court held appointment of such a legal "assistant" was appropriate. *Id.* At 85.

Next, the Rules of Professional Conduct require that 'a lawyer . . . shall withdraw from the representation of a client if . . . . the lawyer is discharged." Rules 1.16(a)(3). Further, the Comments to this rule provide that in cases where the client is mentally incompetent, the attorney "should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client." Defendant conceded Duchardt withdrew at his insistence and the defendant's complaint in this regard is spurious. Further, it is noteworthy how readily current counsel for defendant with casual indifference to his own patent inconsistency, in one breath berates Duchardt for abandoning defendant and in the next chastises him for not withdrawing. As to the appointment of a guardian or its equivalent this suggestion ignores the fact that defendant was then within the aegis of the circuit court, his mental condition was at issue in an ongoing proceeding before that tribunal. The issue and defendant personally were subject to the jurisdiction of the court of general original jurisdiction and in that situation the "comment" to the rule had little relevance. Duchardt could not be expected to defiantly flout the circuit court proceeding and attempt to invoke the jurisdiction of the probate division or to somehow require the circuit judge to appoint a guardian. Neither the evidence nor the posture of the case accommodates such a notion. Further, Defendant was repeatedly advised by counsel and the court not to plead guilty and seek the death penalty. We must ask what effect could a guardian have had upon defendant's

resolve to plead guilty? In neither brief nor argument does defendant suggest an answer to that question.

For his fifth subpoint defendant alleges that counsel was ineffective for not objecting to the court's finding that the defendant was competent to proceed to trial. The chronology tells a tale belying this assertion. Duchardt represented defendant through the hearing and immediately on the heels of the ruling that defendant was competent to proceed, he advised the court of the hiatus between client and counsel. Defendant confirmed that he no longer wanted Duchardt to serve as his attorney and after much discussion and repeated suggestions by the court for defendant to reconsider, the court finally ruled that Duchardt was off the team and assigned to the role of "standby" counsel. The prerogative was no longer his to act as counsel and make objections or otherwise participate in those proceedings except at defendant's request. While it might be argued that defendant could have lodged an objection to the court ruling before he was removed, no prejudice resulted from his failure or inability so to do because the point was preserved and raised on appeal and the ruling of competence affirmed by this Court. The contention is denied.

Defendant's last subpoint alleges that Duchardt was ineffective for not investigating the law or facts pertaining to defendant's competence to proceed pro se. The record does not support the assertion that counsel did not research this area of the law and defendant has failed to meet the burden of proof. Rule 24.035(h). If this unsupported allegation were true, defendant has not shown how it might have affected the voluntariness of his guilty plea. *Troupe v. State*, 766 S.W.2d at 723. Defendant has failed prove that

Duchardt rendered ineffective legal assistance violative of his constitutional rights.

Defendant next alleges that he was deprived of his Sixth and Fourteenth Amendment rights in that Defendant's waiver of counsel was not knowing, intelligent, and voluntary. On direct appeal, appellate counsel asserted: "The trial court erred in finding appellant competent to proceed and in failing to make a separate finding as to appellant's competence to waive his constitutional right to counsel and to a jury trial," this because the evidence was "insufficient" and because "appellate competence to waive constitutional rights was not an issue at the competency hearing . . ." The point was ruled against defendant by the Court in the direct review and accordingly is barred from consideration in the Rule 24.035 proceeding. *Arbeiter v. State*, 738 S.W.2d 516. Even though defendant's point was ruled on direct review, defendant in this postconviction proceeding frames the issue in somewhat different language, tangentially asserting defendant was denied his right to counsel because his "waiver" was not "knowingly, voluntarily or intelligently made" for the reason that "appellant was mentally incompetent to proceed as his own counsel." The trial court entertained this current version of defendant's assertion as an issue not foreclosed by the direct review, and while he appears to have erred in so doing we are loathe to condemn his willingness to permit defendant the opportunity for further hearing on the competency issue and shall examine the record to determine if his findings were clearly erroneous.

We are mindful that an effective waiver of counsel must be voluntarily, knowingly and intelligently executed, *Faretta v. California*, 422 U.S. 836, 95 S.Ct.

2525, 2541, 45 L.Ed.2d 562 (1975), and the test depends "in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378 (1981). Here, defendant, possessed of a ninth grade education, was found to be of average intelligence and throughout demonstrated a credible level of competence in handling his case. In this connection a defendant need not have the skills and experience of a lawyer to competently and intelligently choose self-representation. *Faretta v. Arizona*, 95 S.Ct. at 2541.

In the postconviction hearing, defendant called a plethora of witnesses concerning his competency to waive counsel and proceed pro se. The State called Dr. Mandracchia who, as previously discussed, examined defendant and testified at trial to his competence to proceed. As hereinabove noted, Mandracchia had been apprised that defendant had decided to plead guilty and seek the death penalty but maintained he was nevertheless competent to proceed and concluded "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities." But Mandracchia "surprised" the State in the postconviction hearing by joining with the other professional witnesses and stating defendant was not competent to waive his constitutional right to counsel and proceed pro se. The hearing court determined that the testimony of defendant's witnesses as well as Mandracchia was "unpersuasive" and it was the court's responsibility to determine the credibility of witnesses and weigh the evidence. *See Eddes v. State*, 776 S.W.2d 463, 465 (Mo. App. 1989). The court may

reject any witness' testimony though no contrary evidence is offered. *Id.*

The transcripts of the original and postconviction proceedings reveal an experienced trial judge who cautiously and carefully dealt with the issues presented. There was no rush to judgment, indeed the record is replete with his studied refusal to proceed from one step to the next until all questions were resolved in so far as possible and protective measures invoked to secure defendant's rights. In the protracted proceedings hereinbefore discussed, Judge McFarland perhaps more than any person was favorably positioned to understand defendant and evaluate the evidence. He had ample opportunity to observe defendant and learn the innermost reason for his decision to waive counsel. This observation and oral examination of defendant could not be ignored and was necessarily taken into account when assessing the competency of a defendant to waive counsel. *Edwards v. Arizona*, 101 S.Ct. at 1884.

Judge McFarland's repeated detailed explanation to defendant of his right to counsel, the advantages of accepting appointed counsel, the gravity of waiving counsel and the seriousness of the charges against defendant extended over a two-month period and throughout defendant resolutely stated his desire to waive appointed counsel, proceed pro se, and plead guilty.

Waiving counsel, defendant executed the waiver form in accordance with § 600.051, RSMo.1986, and before accepting the waiver the court again made sure defendant understood the range of punishment, the

right to counsel, possible results from waiving counsel and defendant's right to a jury trial.

In addition, though defendant did not renounce his waiver of counsel, he manifested his cunning, availing himself of the services of "standby" counsel when it met his purpose. During the proceedings, defendant's competence was displayed and was not lost on the court whose many hours of counseling and conversation with defendant gave him special insight and understanding of the factual and legal issues. The point is denied.

The fifth claim of error is closely related to the previous point. Defendant asserts he was incompetent to plead guilty, waive trial by jury and waive investigation and presentation of mitigating evidence in the penalty phase of the proceedings. Again, we note the issue of competence to waive a jury trial was raised and ruled adversely on the direct appeal and is not a proper matter for postconviction relief, *Arbieter v. State*, 738 S.W.2d at 516, and a guilty plea waives the right to a jury trial in the guilt phase. *Griffith v. Wyrick*, 527 F.2d 109, 112 (8th Cir. 1975).

Defendant would have us separate competence to proceed from competence to enter a plea, when in law they are inseparable. *See Mikel v. State*, 550 S.W.2d 863, 869, 870 (Mo. App. 1977), and *Newbold v. State*, 492 S.W.2d 809, 818 (Mo. 1973). A finding of competence to proceed to trial is tantamount to a finding that one is competent to enter a plea of guilty. *Id.* This is simply a further effort by defendant to reargue the trial court's ruling of defendant's competence to proceed and accordingly is denied.

Similarly, defendant's assertion of incompetence to waive investigation and presentation of mitigating evidence during the penalty phase must fail. The finding that defendant was competent to proceed to trial carries the meaning that defendant is able "to assist in his own defense." § 552.020.1, RSMo 1986. A finding of competence to proceed pro se means that the defendant had competency to "call the shots" as to his defense, *State v. Howard*, 668 S.W.2d 191, 195 (Mo. App. 1984), including the introduction of mitigating evidence. In this regard, the prosecution during the penalty stage offered defendant's juvenile records and medical reports, but defendant's objections to this evidence was sustained as he did not want his past "dredged up" again in court.

The sixth point on appeal is that defendant's confession to the police taken at the time of his arrest was taken in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution because defendant was incompetent to waive his *Miranda v. Arizona*, 384 U.S. 436 (1966), rights and Mr. Duchardt was ineffective for not seeking to suppress that statement. This point was raised only in defendant's third amended Rule 24.035 motion filed may 16, 1989, nearly twelve months after his initial pro se filing. Rule 24.035(f) provides a limitation for such filing of sixty days from the date of the appointment of postconviction counsel. Defendant properly filed his first amended motion August 24, 1988, but the third amended motion raising the *Miranda* objection was filed more than six months after the deadline. Defendant's untimely contention is waived. *Day v. State*, 770 S.W.2d 692, 696 (Mo. Banc 1989), *cert. denied* 110 S.Ct. 186 (1989).

Defendant's seventh point on appeal asserts his death sentence exceeds the maximum authorized by law and is violative of the Ex Post Facto Clause of the United States and Missouri Constitutions. He argues the Missouri legislature did not intend to subject defendants as young as he to the death sentence, and by enlarging the scope of the statute this Court in effect created an ex post facto situation. The governing statutes on this matter do not bear out defendant's contention. Section 211.071, RSMo 1986, provides that any child between the ages of fourteen and seventeen who is alleged to have committed an offense which would be considered a felony if committed by an adult may after an appropriate hearing be "transferred [from the jurisdiction of the juvenile court] to the court of general jurisdiction and prosecuted under the general law." Under Section 565.020, RSMo 1986, the crime of murder in the first degree is a class A felony with a possible punishment of death. It defies credulity to assert that imposition of the death sentence in such cases was not intended. An ex post facto law is one which proscribes an act criminal not so proscribed when committed or one which enlarges the penalty after the violation. *State v. Davis*, 645 S.W.2d 160, 162 (Mo. App. 1982). At the time of defendant's crime, the laws as previously noted provided that a person age fourteen years or older could be subjected to the general jurisdiction of a criminal court and a person tried for first degree murder could receive as punishment the death sentence.[4] The point is meritless.

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[4]Section 565.020 has not been amended so that punishment for persons age fifteen and younger for the crime of first degree murder is life imprisonment only. § 565.020.2, RSMo Supp. 1990.

Defendant next complains the trial court failed to weigh evidence in mitigation when assessing the death sentence as required by §565.030.4(3), RSMo 1986. Here again, defendant would resurrect an issue decided adversely to him on direct review. *See State v. Wilkins*, 736 S.W.2d at 415. We note now, as we did then, the report filed by the trial judge states he considered three mitigating factors when assessing punishment against defendant: 1) the age of the defendant, 2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and 3) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. Not only is defendant's point procedurally flawed it misstates the facts.

The ninth point asserts that defendant's sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution because defendant is a juvenile and a presumption should exist that sixteen-year-olds are not sufficiently culpable to be eligible for the death sentence. This point has not only been addressed by this Court but also by the United States Supreme Court and in each instance this contention has been rejected. *State v. Wilkins*, 736 S.W.2d 409 (Mo. banc 1987); *sub. nom. Stanford v. Kentucky*, 492 U.S. ___, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989). Defendant may not use the postconviction rules as a platform to relitigate issues decided on appeal. *Arbeiter v. State*, 738 S.W.2d at 516.

For his tenth point defendant argues that Missouri's death penalty scheme is unconstitutional in that the aggravating circumstance "depravity of mind"

enumerated in §565.032.2(7), RSMo 1986, is unconstitutionally vague. Defendant's point was raised not only on direct review and ruled against him, but when raised in a later case this Court again found that the "depravity of mind" element is constitutional as applied by Missouri courts. *State v. Griffith*, 756 S.W.2d 475, 489-490 (Mo. banc 1988), *cert. denied* 109 S.Ct. 3175 (1989). The point is denied.

The eleventh point asserts the trial court heard inadmissible, incompetent and irrelevant evidence at the sentencing hearing in the form of a presentence investigation report, a victim impact statement and the testimony of Dr. Logan, all in violation of defendant's Sixth Amendment right to confront and cross-examine witnesses. This claim of trial court error available for consideration on direct appeal is not cognizable in a postconviction relief proceeding. *Bevly v. State*, 778 S.W.2d 297, 300 (Mo. App. 1989). However we note that Defendant's position is closely analogous to that of defendant in *State v. McMillin*, 783 S.W.2d 82 (Mo. banc 1990), in which defendant complained of evidence introduced during his sentencing hearing consisted of a presentence investigation report, a "victim impact statement", various documents including records of defendant's disciplinary problems in high school. *Id.* at 96. This Court ruled that the admission of the presentence investigation report is admissible by reason of Rule 29.07(a) and the admission of the "victim impact statement" did not run afoul *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), in that it was the trial court not the jury which determined the facts and decided punishment. *Id.* Such is this case. The admission of the presentence investigation report was proper and no prejudice resulted from the introduction of the victim impact statement.

Defendant next argues the trial court erred by allowing in evidence the testimony of Dr. Logan, privileged under §§552.015, 211.321, and 552.015, RSMo 1986. During direct examination of Logan in the sentencing hearing, the trial court turned to defendant and inquired if he "waived any privilege that you [defendant] might have to not have this witness [Dr. Logan] testify." Defendant responded that he did. Defendant acknowledged he had waived the privilege. *See State v. Evans*, ___ S.W.2d ___ (Mo. banc 1991) (No. 72549, decided January 8, 1991). Point denied.

Defendant's twelfth point alleges his sentence is unconstitutional in that the trial court permitted defendant, "a mentally ill juvenile offender", to terminate the investigation of his defense and waive his right to present mitigating evidence. This is merely a variant of defendant's fourth point on appeal. Having found defendant competent to waive counsel and proceed pro se, it follows that defendant was competent to "call the shots" as to his defense and decline to present any mitigating evidence he may or may not have had at the time. *State v. Howard*, 668 S.W.2d 191, 195 (Mo. App. 1984). Further, defendant's statement that "no mitigating evidence was received" by the trial court is simply not true. Defendant's age, his history of institutionalization, his mental history came in by way of the records and testimony defendant himself has relied upon for his assertion of his mental incompetence. Defendant goes on to state that "the judge as sentencer was not aware, and did not consider, all of the relevant evidence in mitigation that was available at the time or that would have been available through a reasonable investigation." Not only does the record prove false the assertion, but defendant fails to enumerate what this

"relevant evidence" might be. By so failing no prejudice is shown and the point is denied.

The thirteenth point on appeal is simply a request that this Court reconsider its "proportionality review" of defendant's sentence. Though the point has been finally determined and is not appropriate to this proceeding, a review of cases since the affirmance in *State v. Wilkins*, 736 S.W.2d at 417, reveals no disproportionality.

Finally, defendant contends the Rule 24.035 hearing judge erred in not finding that defendant's constitutional rights were violated because Mr. Larry Harman participated in defendant's prosecution. His role was that of a co-prosecutor. Harman had represented defendant seven years earlier in a minor juvenile matter and as the State suggests, this point is procedurally barred from consideration as it appeared for the first time in defendant's second amended motion filed several months after the filing deadline had run. *See* Rule 24.035(f). The deadline for filing such motions is mandatory and cannot be extended by the trial court. *White v. State*, 779 S.W.2d 571, 572 (Mo. banc 1989); *Day v. State*, 770 S.W.2d 692, 696 (Mo. banc 1989). Defendant's point is denied.

Judgment affirmed.

ALBERT L. RENDLEN, JUDGE

Roberston, Higgins, Covington, Billings and Holstein, JJ., concur; Blackmar, C.J., dissents in separate opinion filed.

Supreme Court of Missouri
en banc

HEATH A. WILKINS,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 71936
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

DISSENTING OPINION

I would reverse the judgment and remand the case for trial on the issue of punishment. The question of death versus life imprisonment has not been adversarially tried. Such a trial should be required in any case in which the state seeks to execute a person who was a juvenile at the time the offense was committed. I would allow the guilty plea to stand, but would leave the way open for reconsideration of the waiver of trial by jury. *Cf. State v. Bibb*, 702 S.W.2d 462 (Mo. banc 1985).

It is within our authority under Rule 24.035(a) to make such a holding. That rule reads in pertinent part as follows:

> (a) A person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections who claims that the judgment of conviction or sentence imposed violate

> the constitution or laws of this state or the constitution of the United States, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035. This Rule 24.035 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure before the trial court is governed by the Rules of Civil Procedure insofar as applicable.

Our authority is not foreclosed by any prior proceedings in this case. The defendant filed no notice of appeal, because he received the sentence that he then desired. The case came to use only because of our statutory responsibility to review all death sentences. We initially invited the public defender to file a brief amicus curiae, but then reconsidered and appointed the public defender as counsel. The public defender did not argue in support of the proposition I now advance. ***See State v. Wilkins,*** 736 S.W.2d 409, 414 (Mo. banc 1987).

The Supreme Court of the United States granted certiorari in ***Wilkins v. Missouri,*** 487 U.S. 1233 (1988), to consider a single point, as follows:

> Whether the infliction of the death penalty on a child who was sixteen at the time of the crime constitutes cruel and unusual punishment under the Eighth and

its opinion dealt with only that point. It did not foreclose our consideration of any other points.

It cannot be successfully argued that the defendant "waived" the point by failure to appeal. The record shows clearly that he tried to waive any right to adversarial determination by discharging his counsel and urging the trial court to sentence him to death. Since I would not allow him to waive an adversarial hearing at the trial stage, I would not allow him to effect a waiver by failing to appeal. Since the absence of an adversarial determination is a flaw tainting the entire proceeding, it is appropriately considered in a Rule 24.035 motion.

I do not challenge the statement in the principal opinion as to the trial judge's painstaking efforts to make sure that the defendant understood the consequences of his actions. It is manifest that the defendant, as of that time, wanted to be sentenced to death. He repeated his desire, unequivocally and articulately, before this Court. But it was not his choice as to whether or not he would be sentenced to death. ***Wilkins,*** p. 422, fn. 14, Donnelly, J. dissenting. Sentencing is the responsibility of the jury or, if there is a valid waiver, of the trial judge.

Although the trial judge expressed a strong predilection toward a death sentence before he heard evidence of the punishment phase, I am confident that he exercised his customary thoroughness in evaluating the evidence and weighing the aggravating and mitigating circumstances. Nobody undertook to marshal

the evidence which might support a life sentence, or to argue the reasons for leniency. As the trial judge said in his findings, both the prosecutor and the defendant urged the death sentence. The court did not have the assistance of counsel in adducing the facts and arguments bearing on the death sentence.

I am not sure that a defendant's right to represent himself is absolute, and would question the ability of a person sixteen years old to understand the consequences of a decision not only to forego counsel, but to urge the death sentence affirmatively. But I will not argue that the waiver of counsel was invalid. I would hold that the court, when a juvenile affirmatively seeks the death penalty, should make use of the established procedure of appointing a guardian ad litem or amicus curiae to present evidence and argument against the death penalty. Only in this way can the court have the proper foundation for an informed decision.

Such a requirement would be consistent with decisions in other areas as well as with statutory policy. In ***Strahler v. St. Luke's Hospital,*** 706 S.W.2d 7 (Mo. banc 1986), we held that the legislature could not cause the statute of limitations to run against a minor. The opinion observed as follows:

> We think defendant's contention that plaintiff should not now be heard to complain because she was free to "initiate her own suit" plainly ignores the disabilities and limitations that childhood, familial relationships, and our legal system place upon a minor of tender years -- who has little if any understanding of the

> complexities of our legal system . .. Our society takes great pride in the fact that the law remains forever at the ready to "jealously guard" the right of minors. . . .

Id. at 10, 12.

I cannot understand how a person who could not settle a damage suit could be allowed to present an unchallenged argument in favor of his own execution.

Our legislature has decreed that a minor cannot make her own decision to have an abortion. Section 188.028, RSMo 1986. ***See Webster v. Reproductive Health Services***, ___ U.S. ___, 109 S.Ct. 3040 (1989). Yet the principle opinion would allow the defendant to connive of destroying his own life.

In ***Cruzan by Cruzan v. Harmon***, 760 S.W.2d 408 (Mo. banc 1988), this Court said:

> This State has expressed a strong policy favoring life. We believe that policy dictates that we err on the side of preserving life.

In writing as I do, I realized that the trial court found the defendant competent to stand trial. But it would be a mistake to assume that the issue is free from doubt. The defendant has a troubled psychological history, beginning when he was ten years old, ***Wilkins***, p. 422, Donnelly, J., dissenting. Dr. Parwatikar, who examined the defendant at the request of this Court, said that he was "incompetent to waive his constitutional right and represent himself in front of this Court." As a result, we appointed appellate counsel for

him instead of relying on an amicus curiae. How could he then be competent to waive trial counsel? Dr. Logan, who testified in the trial court, expressed strong reservations about his ability to act in his own interest, and, at the postconviction hearing, said that the defendant was incapable of proceeding without counsel. Dr. Mandracchia, who testified in favor of competency, testified at the postconviction hearing that the defendant was not competent to waive his right to counsel and proceed ***pro se***. Thus the state's own witnesses, when confronted with the realities of the defendant's choice, retreated from their prior positions. Their changed testimony should not simply be brushed aside as the basis that they were unpersuasive. We really should not hold the defendant to a choice made when he was probably incompetent, when the question is one of consenting to execution.

The defendant may be executed for the crime to which he has pleaded guilty. ***Stanford v. Kentucky***, 109 S.Ct. 2969 (1989). But let the adversary process work. Let there be evidence and argument in favor of life imprisonment. There is no compelling reason to hold the defendant to a decision to argue for his own death. The case is unique, and surely will not recur. What harm can there be in allowing a trial?

I would reverse for trial of the punishment phase.

Charles B. Blackmar, Chief Justice

Supreme Court, U.S.
FILED

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No. 98-____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center
Petitioner,

v.

HEATH ALLEN WILKINS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
Volume II

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178 pp

Table of Contents

Volume I

Opinion in *Wilkins v. Bowersox*, No. 96-2441 (8th Cir. June 8, 1998) 1

Dispositive Order in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) . . . 26

Judgment in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) 94

Order Denying State's Motion To Preclude Consideration Of Evidence Adduced Before This Court On Petition For Writ Of Habeas Corpus and granting Wilkins' Motion To Expand The Record, in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996) 95

Order Denying Rehearing and Rehearing En Banc in *Wilkins v. Bowersox*, No. 96-2441 (8th Cir. July 13, 1998) 103

Order Granting Wilkins' Motion To Set Aside Order Dated May 16, 1995 and Revised Motion To Dismiss Certain Claims in the Amended Petition in *Wilkins v. Bowersox*, No. 91-0861-CV-W-5 (W.D. Mo. April 23, 1996) . . 104

Judgment Granting Motion To Remand in *Wilkins v. Delo*, No. 95-2724WMKC (8th Cir. Oct. 3, 1995) 110

Order Denying State's Motion To Alter Or Amend in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo. June 16, 1995) 111

Order Granting Writ of Habeas Corpus in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo. May 16, 1995) 113

Judgment in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo. May 18, 1995) 139

Opinion of the Missouri Supreme Court in *Wilkins v. State*, No. 71936, as reported at 802 S.W.2d 491 (Mo. banc), *cert. denied*, 502 U.S. 841 (1991) 141

Volume II

Opinion of the Missouri Supreme Court in *State v. Wilkins*, No. 68393, as reported at 736 S.W.2d 409 (Mo. banc 1987), *cert. granted in part, Wilkins v. Missouri*, 487 U.S. 1233 (1988), *aff'd sub nom. Stanford v. Kentucky*, 492 U.S. 361 (1989) 176

Transcript Of Proceedings On Plea of Guilty And Sentence Of Death in *State v. Wilkins*, No. CR185-491FX, 492FX, 493FX (Response Exhibit A-2 in *Wilkins v. Delo*, No. 91-0861-CV-W-5 (W.D. Mo.)), pp. 1-194 212

Supreme Court of Missouri
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 68393
	)	
HEATH A. WILKINS,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT
OF CLAY COUNTY

Honorable Glennon E. McFarland, Judge

Defendant Heath A. Wilkins pleaded guilty to first degree murder and was sentenced to death for the brutal and multiple stabbing killing of a 26-year-old mother of two small children during the course of a robbery of the victim's convenience store. Affirmed.

Defendant, proceeding **pro se** after dismissing and waiving appointed counsel, entered pleas of guilty to the murder charge, armed criminal action (sentenced to life imprisonment), and unlawful use of a weapon (sentenced to five years imprisonment), the last charge arising at the time of defendant's arrest approximately two weeks after the murder. Even though defendant dismissed and waived his right to an attorney, the trial judge directed the attorney to stand by throughout all of the proceedings and be available to counsel and advise the defendant upon the latter's request.

The transcript of some 300 pages clearly reveals that the experienced and capable trial judge, the Honorable Glennon E. McFarland, fully explained, time and time again, defendant's various legal rights. Judge McFarland made repeated efforts to dissuade defendant from dismissing counsel and proceeding without an attorney. And, the conscientious trial judge offered to permit defendant to reconsider and withdraw his guilty pleas. Throughout the several court hearings, the defendant told the trial judge that he had fully and knowingly considered the alterative punishment of life imprisonment without eligibility for parole and that of the two possible sentences he preferred the death sentence. **Section 565.020**, RSMo 1986.

Because of defendant's stated position and acting as his own attorney, defendant did not take any of the prescribed steps to appeal his guilty plea and death penalty. Nevertheless, this Court requested the State Public Defender to enter the case as **amicus curiae** and to brief and argue "any issue subject to review."

The case was argued before the Court after defendant, appearing in person, advised the Court that he did not want the assistance of an attorney in the proceedings in this Court. At the conclusion of the arguments, the defendant was permitted to make a statement to the Court in which he took issue with some remarks of the public defenders arguing the case. The Court ordered defendant examined by the Department of Mental Health of Missouri to determine defendant's competence to waive counsel on appeal and ordered the case held under submission pending the report.

The report and evaluation of the defendant by the Department of Mental Health was filed with the Court, and the Court set aside the submission and appointed counsel to represent defendant. New briefs were filed and argument heard anew.

The complete record, consisting of the legal file and transcript, are before the Court. In order that this Court can properly review the death penalty imposed in this case and also consider the points advanced by the appointed counsel, it is necessary to set forth in some detail the evidence which led to the imposition of the ultimate penalty.

Approximately two weeks before July 27, 1985, the date of Nancy Allen's murder, defendant's friend, Patrick Stevens, was telling the defendant that he needed some money. "I [Wilkins] said, 'I know where we can get some money.' . . . I told him exactly how we were going to do it and where we were going to do it." Defendant then described to Stevens a plan to rob Linda's Liquors, which was later communicated to two other confederates, Ray Thompson and Marjorie Filipiak. Linda's Liquors and Deli was owned and operated by Nancy and David Allen. It is a small convenience store located in the town of Avondale.

The four freely discussed the plan to rob Linda's or an alternative location during the next two weeks. Defendant also stated to the others that he would kill whoever was behind the counter because he wanted no witnesses. During the period before the crime, defendant sharpened his "butterfly" knife (a narrow-bladed martial arts weapon) with a diamond file. Defendant's girl friend, one of the four privy to the plan, attempted to dissuade him from his murderous plot.

She had obtained some money from her parents and offered to run off with defendant but he declined.

On the evening of July 27, 1985, the four individuals were together. Defendant and his cohorts decided that the robbery of Linda's Liquors and Deli was on for that night. They all went to North Kansas City Hospital where they arrived about 10:15 p.m.

Leaving the other two, who were to secure taxis for after the robbery, defendant and Stevens left the hospital. To avoid detection they went through the woods to the deli. They carried a bag for carrying stolen merchandise. They arrived at a creek near the deli about 10:30 p.m. They observed the deli for a time because there were customers present. When the last customer had gone, they approached the deli. They took a towel out of the bag and wiped their shoes so that they would not leave mudprints. So that the counter person, Nancy Allen, would not be suspicious, they left the bag outside.

According to their prearranged plan, defendant ordered a sandwich while Stevens went to the rest room behind the counter. Noticing that Nancy Allen was not where Stevens could easily reach her, defendant asked her for additional lettuce. When she moved to comply with the defendant's request, Stevens rushed out of the rest room and grabbed her. Defendant went around the counter and thrust his knife into her back. Defendant said he was aiming at the kidneys, which he thought would be a fatal wound.

Nancy Allen fell face down onto the floor. However, she rolled into a spread-eagled position with her back on the floor. Stevens could not find everything

that he wanted to take and could not operate the cash register. He asked defendant what to do. Nancy Allen replied, directing Stevens to what he sought but this caused defendant to stab his helpless victim three more times in her chest. Two of these pierced the heart. She continued to speak, begging for her life. Defendant silenced her with four stabs into the neck, one of which opened the carotid artery.

As Nancy Allen's pierced heart oozed its life's blood into the opened cavaties of her lungs and onto the floor, defendant and Stevens gathered up cash and merchandise and left the store. Defendant wiped fingerprints off the door handle before leaving. They stuffed the stolen items in the bag outside and left. Nancy Allen lay dying on the floor.

The pair met their compatriots at the hospital. They paired up and left in separate taxis for the Greyhound Bus Depot. They paired up again in a different combination and went to their common summer hangout, Sherwood Lake. The cash register coin tray was thrown into the lake and they burned the stolen checks. A week later defendant wanted Stevens to lure "some guys" into the lake area so he, the defendant, could kill them. This action was aborted when a police officer came into the area and defendant threw the murder knife into the lake.

Street talk led the Metropolitan Major Case Squad to the defendant and his companions, and they were picked up by police on August 10th. Before taking a statement, Detective Ron Nichola advised defendant of his rights. Defendant's mother, Lt. Dave Rogers, and a juvenile officer were also present. An extremely incriminating statement was taken. The certification for

16-year-old Health Wilkins' trial as an adult was obtained on August 15, 1985 as required by **Section 211.071**, RSMo Supp. 1984.

The litany of Fifth Amendment rights was read again to defendant at his arraignment in circuit court on October 17, 1985. Appointed counsel Fred Duchardt of the Clay County Public Defender's Office represented Wilkins and entered a plea of "not guilty by reason of mental disease or defect excluding responsibility" or "not guilty" to all the charges against defendant. A mental examination was ordered and the results from the Western Missouri Mental Health Center were filed with the court on December 19, 1985. Defense counsel sought an additional examination, which was obtained privately at the Menninger Clinic in Topeka, Kansas. The results of that examination became available in April of 1986.

A competency hearing was set for April 16th to inquire into the competency of the defendant at the time of his act as well as his present competency to stand trial. Unknown to the court but after long discussions with attorney Duchardt, defendant reversed his position. Defendant wanted to release counsel and proceed **pro se**, plead guilty, waive jury trial, and actively seek a sentence of death as his penalty.[1] The trial court first

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[1]This is not as novel as it might sound. See Urofsky, A Right to Die: Termination of Appeal for Condemned Prisoners, 75 J. of Crim. L. & Criminology 553, 553 91984) (examining cases where convicted murders voluntarily terminated appeals that would have delayed their executions). "For some on death row, however, the darkest fear is not execution, but the prospect of living out their natural years

became fully aware of this turn of events at the April 16th competency hearing. Dr. Steven A. Mandracchia examined the defendant on November 27, 1985 before knowing that defendant intended to seek the death penalty. However, Dr. Mandracchia's opinions about defendant's competency were unequivocal. He said "that there was no evidence of mental disease or defect as defined by chapter 552 of the revised statutes of the state of Missouri." Later, after being advised of the defendant's intention to seek the death penalty, his opinion did not change. "I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities."

Dr. William S. Logan, M.D., Director of Law and Psychiatry at the Menninger Foundation, examined the defendant in March 1986 after the defendant had made his fateful decision. Attorney Duchardt had fully advised Dr. Logan of Wilkins' intentions as did the examinee himself. Dr. Logan resisted giving the categoric competency opinion that Dr. Mandracchia had given. Nonetheless, he found that the defendant had average intelligence. Moreover, although he found that Wilkins suffered from some emotional disorders of long standing, Dr. Logan "didn't see [Wilkins] as meeting the criteria for a severe mental illness as defined under the statutes of Missouri." In fact, Dr. Logan characterized "the execution of the crime as very purposeful, very deliberate, very well planned . . . . [with the defendant making] numerous efforts to avoid detection, showing that he appreciated the wrongfulness of it . . . . " After

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incarcerated in a six-by-nine cell, under constant surveillance, with little or no hope of ever regaining their freedom." Id.

hearing this testimony and interrogating defendant, the court found defendant to be competent.

Despite the finding of defendant's competency, Judge McFarland did not immediately grant his motion to proceed **pro se**. The right to proceed without counsel upon a voluntary and intelligent election has been recognized by the Supreme Court of the United States. **Faretta v. California**, 422 U.S. 806, 807 (1975). However, the **Faretta** court recognized the disadvantages to a defendant who proceeds **pro se**. **Id**. at 834-35. Here, the trial court found iteself faced with a peculiar constitutional quandary - a defendant may not be convicted and imprisoned without being accorded the right to assistance of counsel but a defendant may help himself into a conviction by his voluntary albeit inadequate self-representation. ***Id.*** at 832-33.

Consequently, the circuit judge took steps to ensure that the gravity and importance of defendant's decision was brought home to him. Judge McFarland explained the advantages of counsel to defendant, highlighted defendant's own inadequacies of education, age, and experience, and set the **pro se** hearing off for another week to ensure that defendant gave additional thought to this matter.

When the hearing resumed on April 23, 1986, the judge strongly voiced his belief that defendant should be represented by an attorney. He explained each consequence of defendant's action: the waiver of trial by jury on each charge including both phases of the murder trial, the ranges of punishment, the necessity of written waivers, as well as a detailed and vivid description of the effects of execution by poison gas.

Finally, he set a pleading hearing for May 9th and admonished the defendant to talk to those whom he trusted and who could advise him about his chosen course.

On May 9th, the circuit court reconvened to consider defendant's desire to change his pleas to guilty and to waive trial. Again, the court persisted in its efforts to convince the defendant that the course was unwise. Again, the court advised him of the enormity and finality of his waivers of legal rights. Defendant politely but firmly rejected the court's advice. Judge McFarland explained that this course would probably lead the cout to impose a death penalty. But, he explained that defendant might still get the life sentence. Finally, the court took evidence to substantiate a factual basis for the change of plea. At length, the court concluded that defendant understood the consequences of his actions and that defendant voluntarily and knowingly was waiving his rights and entering guilty pleas, and the court accepted the pleas of guilty to all the charges including murder in the first degree.

At the sentencing hearing of June 27, 1986, the court entered the maximum sentences on the two lesser charges. Judge McFarland again reviewed the variety of rights available to the defendant for the asking. Defendant declined again. The court offered him a chance even at this late stage to withdraw his plea.

> **The Court:** You understand that I think it would be in your best interests that you withdraw your plea?
>
> **Defendant:** "I understand what you think, your Honor."

Evidence was taken in the sentencing stage. It amply supports the guilt of the defendant. Heath A. Wilkins stood up at his last opportunity to address the circuit court and told the court, ". . . I'm asking the court to consider the death penalty as a [sic] more humane in the extent of possible happenings and pain received by, you know, me . . . . One I fear, the other one I don't."

Judge McFarland entered his order.

> The court does feel that the defendant's decision [to ask for death] was made rationally and after due thought and deliveration . . . . The court finds beyond reasonable doubt that the following aggravating circumstances exist: number one, the murder in the first degree was committed while the defendant was engaged in the perpetration of the felony of robbery; and, number two, the murder in the first degree involved deparavity of mind and that as a result thereof it was outrageously or wantonly vile, horrible or inhuman.

Section 565.032.2 subs. (11) and (7), RSMo. Supp. 1984 (respectively).

Counsel for defendant raise four major points and multiple sub-points in their brief. First, that the trial court erred in finding defendant competent to proceed because the evidence was inadequate and that the trial court failed to make specific findings on the defendant's competency to waive his constitutional rights.

Second, counsel argued that the circuit court failed to consider mitigation at the sentencing hearing as required by the decision of the Supreme Court of the United States and the Missouri sentencing statute. Counsel also contend in their second point that the trial court erred quantitatively in weighing the aggravating circumstances it had found against the mitigating circumstances it had found. The court did not find two other aggravating circumstances beyond a reasonable doubt that had been requested for consideration by the State: "The offender committed the offense of murder in the first degree for himself or another, for the purpose of receiving money or any other thing of monetary value from the victim of the murder or another." Section 565.032.2(4). "The murdered individual was a witness or potential witness in any past or pending investigation or past or pending prosecution, and was killed as a result of his status as a witness or potential witness." Section 565.032.2(12).

Third, the death sentence should be set aside because it is comparatively disproportionate to the penalty imposed in similar cases.

Finally, counsel contends that the death penalty is cruel and unusual per the Eighth Amendment of the United States Constitution and Article I, Section 21 of the Missouri Constitution.

This Court has repeatedly rejected constitutional challenges to Missouri's death penalty provisions. **State v. Driscoll**, 711 S.W.2d 512, 517 (Mo. banc 1986) (list of citations). Similarly, the Supreme Court of the United States has held that the death penalty is not **per se** cruel and unusual punishment prohibited by the Eight Amendment. **Gregg v. Georgia**, 428 U.S. 153,

188-95 (1976) (plurality opinion). Recent decisions have not varied from that course. **See** Project: Criminal Procedure, 75 Geo. L.J. 1170 (1987). The point should be denied.

Counsel contends that the lower court's finding of defendant's competency was not supported by sufficient evidence; further that the trial judge failed to make a specific finding of defendant's ability to waive constitutional rights. In testing sufficiency, the reviewing court does not weigh the evidence but accepts as true all evidence and reasonable inferences that tend to support the finding. **State v. Brown**, 660 S.W.2d 694, 698-99 (Mo. banc 1983). This Court has observed the defendant, his demeanor, and listened to him, and the trial judge had over a period of months observed the defendant for prolonged sessions of hearings.

The psychological record is not insufficient as characterized by counsel but extensive and consists not only of the expert testimony but also the galaxy of tests, and records on which they relied, from the numerous institutions with which defendant had dealt. The basic test is whether mental illness renders the criminal defendant incompetent to stand trial because he "lacks capacity to understand and proceedings against him or to assist in his own defense." **Section 552.030.3(1)**, RSMo Supp. 1984; ***see*** Winick, Restructuring Competency to Stand Trial, 32 U.C.L.A. L. Rev. 921, 923 (1985). The overwhelming and uncontroverted evidence on this record establishes that defendant has met and continues to meet this basic test.

Counsel urge that there should be a heightened test of competency in this case. Although an incompetent, as a juvenile, may be impaired by his

limited cognitive and social capacities, cf. Winick, supra, at 961 (discussing various situations in which a defendant may waive his incompetency status), Judge McFarland could not have been more unbiased, reasonable and fair in his consideration of competency. Any finding of competency necessarily entails the ability to waive certain rights beginning with the very first strains of Miranda. Id. at 961 (juveniles may validly waive both self-incrimination and right to counsel privileges). Moreover, and analogous to the threshold question of competency to stand trial, Missouri law presumes competency, as all persons are presumed to be free of mental disease or defect which would exclude their responsibility for their conduct. **Section 552.030.7,** RSMo Supp. 1984. The point is denied.

In the second point it is contended that the trier failed to consider mitigation as required by state statute, **Section 565.030.4**, RSMo Supp. 1984, and by **Eddings v. Oklahoma**, 455 U.S. 104, 110-14 (1982). This claim is not supported by the record. The trial judge clearly indicates that he considered mitigating factors in addition to defendant's age in the required trial report. Defendant was 16 years and seven months old when he murdered Nancy Allen. He was 17 years and four months old when he pleaded guilty. He had completed nine years of education and had an intelligence quotient of 105.[2]

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[2]**See: Burger v. Kemp**, ___ U.S. ___, 55 L.W. 5131, 5132, N. 1 (1987) and dissenting opinion of Powell, J., at 5143. Issue was alleged ineffective assistance of counsel. Defendant was 17-years-old at time of murder, had an I.Q. of 82, functioned at a 12-year-old level, and had possible brain damage from beatings when he was child.

The report of the trial judge shows that he considered whether the murder "was committed while the defendant was under the influence of extreme mental or emotional disturbance." **Section 565.032.3(2),** RSMo Supp. 1984. Second, he considered whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." **Section 565.032.3(6).**

Counsel suggest that the weighing of mitigating factors is a quantitative or tallying process. Clearly it is not. For example, the trier must assess the punishment in a capital murder case at life imprisonment "[i]f the trier finds the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found by the trier." **Section 565.030.4(3),** RSMo Supp. 1984. Just one mitigating factor might permissibly outweigh several aggravating circumstances under this provision and require the imposition of only life imprisonment and not the death penalty. But the reverse is also true. The trier may find that at single aggravating circumstance beyond a reasonable doubt "warrant[s] imposing the death sentence." **Section 565.030.4(2).** The trier's judgment as to the appropriateness of the sentence must be guided but is still discretional. The weighing process is a qualitative one not a quantitative one. The trial court considered all the mitigating circumstances

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Thompson v. State, 724 P.2d 780 (Okla. Crim. App. 1986) (defendant 15-years-old at time of murders), **cert. granted** 107 S.Ct. 1284-85 (1987), to consider whether Eighth Amendment imposes an age limitation on the application of the death penalty.

fairly presented by the evidence and did not find that they outweighed the aggravating circumstances found beyond a reasonable doubt. The point is denied.

Counsel in point three ask us to do no more than what this Court is mandated to do. Section 565.035, RSMo Supp. 1984. The court must review whether the imposition of the death penalty was influenced by passion or prejudice, was supported by evidence of the statutory aggravating factors enumerated by the trier of fact, or was disproportionate or excessive when compared to similar cases. **See State v. Battle**, 661 S.W.2d 487, 493-95 (Mo. banc 1983), **cert. denied**, 466 U.S. 993 (1984).

The record bears no suggestion of prejudice, passion or any other arbitrary factor. The trial court's patience and fair play were well-demonstrated throughout. Similarly, the evidence supports his finding that defendant Wilkins committed the murder of Nancy Allen in a wantonly vile, horrible and inhuman manner. With cool, deliberate premeditation he remorselessly executed the prone, helpless Nancy Allen, who had ample time to consider her demise, her husband, and her one-year-old and three-year-old girls. Defendant brutally silenced her pleas for mercy. The defendant freely admits that he committed this murder during a robbery, which supports the other aggravating circumstance found by the trier. The death penalty was not influenced by passion or prejudice and the evidence supports the trial court's finding of two aggravating circumstances beyond a reasonable doubt.

Finally, we are required to consider whether this sentence of death is disproportionate to the penalty imposed in similar cases considering both the

circumstances of the crime and the defendant. State v. Foster, 700 S.W.2d 440, 445 (Mo. banc 1985), cert. denied, 106 S.Ct. 2907 (1986). The cases the Court has reviewed demonstrate the penalty of death imposed here is not excessive or disproportionate to similar cases.

In **State v. Foster**, 700 S.W.2d 440, 441 (Mo. banc 1985), defendant, with an accomplice, planned an armed robbery of the apartment of two acquaintances. The jury in **Foster** found four aggravating circumstances, including two which are essentially identical to those found in the instant case - a murder involving depravity and a murder for gain. Death was imposed. **Id.** at 445.

In **State v. Lashley**, 667 S.W.2d 712, 716 (Mo. banc), **cert. denied**, 469 U.S. 873 (1984), defendant was 17 years and one month old at the commission of the murder. Defendant with the intention of robbing the victim had stabbed the victim who did not die at the instant of attack. Lashley had been committed to various institutions and was considered to be of average intelligence. The death penalty was imposed.

In **State v. Newlon**, 627 S.W.2d 606, 609-10 (Mo. banc), **cert. denied**, 459 U.S. 884 (1982), an armed defendant entered a store with his accomplice after waiting for customers to leave so that the lone attendant would be isolated. Defendant entered knowing that the attendant might be killed after an accomplice's remark before they entered the store. The trier found that the murder was wantonly vile. **Id.** at 621. The death penalty was imposed.

See also State v. Johns, 679 S.W.2d 253 (Mo. banc 1984), **cert. denied**, 470 U.S. 1034 (1985); **State v. Byrd**, 676 S.W.2d 494 (Mo. banc 1984), **cert. denied**, 469 U.S. 1230 (1985); and **State v. Malone**, 694 S.W.2d 723 (Mo. banc 1985), **cert. denied**, 106 S.Ct. 2292 (1986).

Aside from the general principles of deterrence, defendant's execution-murder of Nancy Allen is exceptional in its brutality. Unlike any of the cited cases except **Newlon**, the evidence herein demonstrates an express preexisting plan on defendant's part to kill anyone and everyone he found at Linda's Liquors and Deli to eliminate potential witnesses. This was no spur of the moment decision on defendant's part, but planned. Although the victim in this case was immediately assaulted when the robbery began, she had a substantial time in which to anticipate her fate and to plead for her life. **Cf. State v. Newlon**, 627 S.W.2d at 622. The suffering of the victim is certainly a factor in comparing this with other cases. **State v. Smith**, 649 S.W.2d 417, 434-35 (Mo. banc), **cert. denied**, 464 U.S. 908 (1983). Even after inflicting a mortal wound upon Nancy Allen, defendant was not content to let her die. He inflicted further mutilation upon her by stabbing her repeatedly in the throat to stop her from talking. **Cf. State v. Johns**, 679 S.W.2d at 257; and **State v. Malone**, 694 S.W.2d at 724. As all of those facts demonstrate, the murder at bar is substantially more heinous than past killings which have been found to justify a sentence of death.

Another factor supporting defendant's sentence, newly recognized in Missouri's 1984 revision of the homicide statutes, is the strength of the evidence against him. **Section 565.035.3(3).** Heinous murders

have been committed in the past in which the evidence of the crime was circumstantial and the precise role of the accused in the killing was unclear; in such cases, an inference exists that the jury may have rejected a sentence of death for that reason. **See, e.g., State v. Turner**, 623 S.W.2d 4, 607 (Mo. banc 1981), **cert. denied**, 456 U.S. 931 (1982); and **State v. Mitchell**, 611 S.W.2d 223, 224-25 (Mo. banc 1981). Such is not the case here. Defendant has admitted and described in great detail his dominant role in the killing of Nancy Allen from his planning of the murder in advance to his stabbing the victim to death, and his account is corroborated by autopsy evidence and the crime scene. By definition, the evidence of defendant's guilt could not be any greater than it is in a plea of guilty.

The final and a most chilling factor to be considered is the nature of defendant himself and his attitude toward human life. In his words, Nancy Allen was a "trash can" whose most convenient disposition was to be killed so she would not be "a bother" to defendant in the future. As evidence by his actions, this statement by defendant is not mere bravado because he had made a prior and unconditional decision to kill the witnesses to his planned robberies and he had no reason to kill Nancy Allen other than the possibility that she might later testify against him. This was only one of a series of robberies and murders that defendant had intended to commit had he not been apprehended, and he had made attempts to kill people, including his mother, both before and after the Nancy Allen murder. There can be no doubt that, given defendant's attitude, he will unhesitatingly kill anyone who "gets in his way" unless and until he is prevented from doing so by the forces of civilized society. The sentence of death

imposed upon defendant is the only reliable means of achieving that aim.

The judgment is affirmed.

WILLIAM H. BILLINGS, Chief Justice

Robertson, Rendlen and Higgins, JJ., concur; Blackmar, J., dissents in separate opinion filed; Donnelly, J., dissents in separate opinion filed; Welliver, J., dissents in separate opinion filed and concurs in dissenting opinions of Blackmar and Donnelly, JJ.

Supreme Court of Missouri
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 68393
	)	
HEATH A. WILKINS,	)	
	)	
Appellant.	)	

DISSENTING OPINION

For the reasons assigned by Judge Billings the points raised by appointed counsel are without substance. The trial judge is to be commended for his fair and balanced handling of a very difficult situation.

Judge Billings expounds the deliberateness and atrocity of the killing. Judge Donnelly, in his dissenting opinion, demonstrates the vagaries in jury sentencing, describing killings which are no less repulsive, but in which the jury did not assess the death penalty. He senses a tendency to assess life rather than death when the offender is very young. I cannot add to the meticulous scholarship of both of my brethren.

Section 565.035.2, RSMo 1986, effective 10-1-84, directs us to "consider the punishment . . . ." Pursuant to this obligation, I would hold that a defendant who was a juvenile at the time of the offense should not be subject to the death penalty. In **State v. Battle**, 661 S.W.2d 487, 495 (Mo. banc 1983) and

State v. Lashley, 667 S.W.2d 712, 717 (Mo. banc 1984), I argued unsuccessfully against death sentences for minors. I would draw a line at the juvenile level. Lines must be drawn somewhere; the offender below fourteen may not be punished as a criminal. See Section 211.071, RSMo 1986. The death sentence should be reserved for those capable of mature deliberation. See Ellison, State Execution of Juveniles: Defining "Youth" as a Mitigating Factor for Imposing a Sentence of Less than Death. 11 Law and Psychology Review 1 (Spring, 1987).

It is suggested that my position is contrary to state policy as defined by the legislature, inasmuch as the statutes contain no prohibition on the execution of persons who were juveniles at the time of commission of the offense. I believe that the duties imposed on us by Section 565.035.2 authorize us to adopt some objective standards for imposition of the death penalty. I also submit that our duties under that section are in addition to the duty of comparison imposed by 565.035.3, and that we should undertake a broader review of death sentences than we have in the past. I concur with Judge Donnelly as to the remaining issues discussed in his dissenting opinion.

CHARLES B. BLACKMAR, Judge

Supreme Court of Missouri
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 68393
	)	
HEATH A. WILKINS,	)	
	)	
Appellant.	)	

DISSENTING OPINION

Mandatory review under section 565.035, RSMo 1986.[1]

In this case, defendant entered pleas of guilty and expressed a desire to be put to death. The Court conducts its mandatory review, §565.035, RSMo 1986, of a sentence of death, imposed following a hearing to determine punishment, § 565.032.2, RSMo Cum. Supp. 1983. For reasons stated, we reduce sentence to life

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[1]Defendant filed no after-trial motions or notice of appeal in this case. Counsel appointed to represent defendant in proceedings before this Court have briefed and argued numerous points of law. We decline to review these at this time, given our disposition of the case. We intend no suggestion as to the merit of counsel's claims which may be grounds for post-conviction relief under Rule 27.26; defendant may pursue such relief at his option.

imprisonment without possibility of probation or parole, barring executive act.

The facts are undisputed, drawn from defendant's statements to a police investigator and to the trial court during the sentencing phase, from reports and testimony of psychiatrists who examined defendant, and from the report of a presentence investigator. On the night of the fatal stabbing of Nancy Allen, defendant Wilkins was aged sixteen years, six months, twenty days. For about a month previous, he had been living on the streets of Kansas City with three other juveniles, Pat "Bo" Stevens, Roy "Shades" Thompson, and Marjorie "Midget" Filipiak. At Wilkins' initial suggestion, the foursome plotted to rob area businesses. Defendant proposed, and the group acceded to, Linda's Liquor and Deli in Avondale as an initial target. Wilkins maintained he would kill anyone present to conceal the perpetrators' identities. To facilitate his claimed objective, Wilkins purchased a narrow-bladed, martial arts knife from Stevens with money defendant had stolen from a laundromat.

As preconceived one to two weeks before, an intricate plan unfolded July 27, 1985. At or near 10:15 p.m., the four juveniles met at North Kansas City Hospital. Defendant and Stevens walked through a wooded area to the nearby deli, leaving Fillipiak and Thompson at the hospital to await their return. The two boys stalked the target from along a neighboring creek while customers transacted business in the store and left. It was nearing closing time. Around 11:00 or 11:30 p.m., toting a change of clothes apiece in defendant's handbag, the two youths executed the crime. The handbag was left outside the deli to avert suspicion; both boys wiped mud from their shoes to

avoid leaving footprints inside. Nancy Allen, the store clerk, was alone, seated behind the counter, when the boys entered. Wilkins ordered a sandwich. Stevens asked to use the restroom. When Stevens exited, he grabbed the victim, holding her while Wilkins rushed forward, produced the knife, and stabbed her in an area of her back he thought to be her kidney. Allen fell to the floor. Lying on her back, the victim responded to a question Stevens put to her, and began pleading with defendant not to kill her. Wilkins told Allen to be quiet, then stabbed her repeatedly in the chest and throat areas. Expert medical testimony indicated Mrs. Allen probably was deceased before Wilkins imparted the last wound to her body.

Stevens pilfered cash, checks, liquor, cigarettes and rolling papers from the cash register and store displays. Roughly $450.00 in cash and checks were taken. Stevens then "freaked out," and defendant had to push him out the door. Wilkins wiped Stevens' fingerprints from the doorknob before the pair made their immediate flight.

Defendant and Stevens rendezvoused with Filipiak and Thompson at the hospital. To evade any pursuit, the foursome left the hospital in cabs Filipiak summoned from two local cab companies. The juveniles rode in pairs to a Kansas City bus depot. There, they talked a while, divided the stolen cash, and the principals changed clothes. Stevens and Thompson left, again in a cab. Wilkins and Filipiak lagged behind about an hour to play video games, then left by the same means. The four met back at the lake area they frequented in Penguin Park and "tripped out." They used the stolen checks to start a fire. Defendant used his share of the money to buy drugs.

About a week later, Wilkins encouraged Stevens to lure "some guys" into the lake area so defendant could kill them. This plan was aborted when a patrolling police officer happened into the area. Wilkins threw his knife into the lake to avoid discovery. The weapon never was found.

Defendant was arrested August 10, 1985. He acquiesced to giving a statement, in which he admitted to and described in detail the deli store murder.

As indicated above, this case comes to the Court in a peculiar posture. Wilkins was certified to be tried as an adult and was appointed counsel, Mr. Frederick Duchardt. In late January or early February 1986, Wilkins informed Duchardt that he wished to withdraw an earlier plea, not guilty and not guilty by reason of mental disease or defect, and substitute pleas of guilt to all charges.[2] Defendant also expressed a desire to seek the death penalty as his punishment. Counsel refused to aid Wilkins in his sordid goal.

Two psychiatrists and a clinical psychologist investigated defendant's competence to stand trial through interviews and testing. On considering the psychiatrists' testimony at an April 16, 1986, hearing, the trial court found Wilkins competent to proceed. Wilkins immediately moved, pro se, to represent himself before the court. One week later, the court accepted

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[2]Wilkins was charged with first degree murder, § 565.020.2, RSMo 1986; armed criminal action, §571.015, RSMo 1986; and unlawful use of a weapon, § 571.030.1, RSMo 1986.

defendant's written waive of counsel.[3] Mr. Duchardt was discharged from representation, but the court ordered him to remain available to answer any legal questions defendant might have.[4]

Wilkins immediately announced his desire to enter guilty pleas to all charges. The court attempted to dissuade him, to the point of describing how lethal-gas executions were performed. Defendant was encouraged to "talk to other people about this decision you're having to make," and the cause was continued until May 9, 1986. Wilkins persisted. When the case was resumed, he offered written petitions to enter the desired pleas. After extensive questioning, during which the trial judge offered defendant every opportunity to change his mind, the pleas were accepted as to each count. Sentencing was scheduled for June 27.[5]

Wilkins was given maximum sentences for the lesser offenses: five years' imprisonment for unlawful use of a weapon, life imprisonment for armed criminal action. The court then considered evidence on the

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[3]The court constantly reminded defendant of the wisdom of professional representation throughout these proceedings.

[4]The Court commends Mr. Duchardt's service to the court below, under what undoubtedly were frustrating circumstances.

[5]Indicative of the leeway the trial judge afforded Wilkins, the court informed that in the interim it would consider any change of heart Wilkins entertained reference his plea to the murder charge. Defendant remained firm in his intention.

appropriate sentence for Nancy Allen's murder.[6] In a bizarre climax to the proceedings, both prosecutor and defendant urged the ultimate sanction. Defendant realized his goal - the court passed a sentence of death. Supporting the sentence imposed, it found as aggravating circumstances that: 1) Defendant was engaged in perpetrating a felony (robbery) when the murder was committed, § 565.032.2(11); 2) The murder was outrageously or wantonly vile, horrible or inhuman, since it reflected depravity of mind, §565.032.2(7).

Neither the record nor counsel suggest the sentence imposed reflects the least hint of passion, prejudice or arbitrariness. § 565.035.3(1), RSMo 1986. Moreover, the record supports the court's conclusions under section 565.032.2(7) & (11), RSMo 1986. We turn, therefore, to the dispositive question, "whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant." § 565.035.3(3), RSMo 1986. Under the facts of this case, in light of Wilkins' age as of the offense, his prolific abuse of drugs and alcohol, and his long history of mental and emotional affliction, we hold the sentence excessive and disproportionate, and reduce that sentence to one of life imprisonment without possibility of probation or parole, barring executive clemency. § 565.035.5(2), RSMo 1986.

> Relevant cases for a review of the appropriateness of the sentence are those in which the judge or jury first found the

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[6]Defendant waived trial by jury for the penalty phase of his murder trial. See § 565.030.4, RSMo 1986.

> defendant guilty of capital murder and thereafter chose between death or life imprisonment without the possibility of parole for at least fifty years.

State v. Bolder, 635 S.W.2d 673, 685 (Mo. banc 1982), cert. denied, 459 U.S. 1137 (1984).

First, we consider defendant's age. In four capital cases involving youths of comparable age, a life sentence was imposed. State v. Greathouse, 627 S.W.2d 592 (Mo. 1982) (defendant age seventeen); State v. Allen, 710 S.W.2d 912 (Mo. App. 1986) (defendant age sixteen); State v. White, 694 S.W.2d 802 (Mo. App. 1985) (defendant age seventeen); State v. Scott, 651 S.W.2d 199 (Mo. App. 1983) (defendant age sixteen). Only one Missouri youth has been sentenced to die who was seventeen years old or younger as of his crime. State v. Lashley, 667 S.W.2d 712 (Mo. banc), cert. denied, 469 U.S. 873 (1984).

In Greathouse, Allen, White, and Scott, the jury was instructed on defendants' lack of prior criminal activity as a mitigating factor reference sentence. In this sense, the case sub judice is distinct.[7] But the jury was similarly instructed in State v. Battle, 661 S.W.2d 487 (Mo. banc 1983), cert. denied, 466 U.S. 993 (1984) (defendant aged eighteen years, four months; no significant history of criminal activity; death sentence affirmed), and State v. Blair, 638 S.W.2d 739 (Mo. banc

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[7]Wilkins, from an early age, engaged in arsons, burglaries, and stealing. These activities were before the court for its consideration during sentencing, embodied in Wilkins' juvenile records. § 211.321.1, RSMo 1986.

1982), cert. denied, 459 U.S. 1188, reh'g denied, 459 U.S. 1229 (1983) (defendant eighteen; same history and sentence). As to this age group of offenders, then, the absence, and thus presence, of a significant history of criminal acts may be an unreliable predicate for proportionality review. As to this age group of offenders, perhaps the most to be said is that age as a mitigating factor, § 565.030.3(7), RSMo 1986, standing alone, is insufficient to overturn a death sentence, on grounds the penalty is excessive or disproportionate, once the trier of fact has passed such sentence. State v. Lashley, 667 S.W.2d 712 (Mo. banc), cert. denied, 469 U.S. 873 (1984); State v. Battle 661 S.W.2d at 494-95.[8]

Next, we look to cases in which death was imposed on a young offender and make comparison based on the nature of the killing. In State v. Battle, 661 S.W.2d 487 (Mo. banc 1983), cert. denied, 463 U.S. 993 (1984), defendant, eighteen, stabbed an eighty-year old woman with a twelve-inch butcher knife. The mortal wound was inflicted just below the victim's left eye. The elderly woman, "naked, beaten and ravished," suffered nearly three hours before she died. The jury recommended the death penalty, after being instructed only on the "vile, horrible or inhuman" nature of the killing as an aggravating circumstance. See §

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[8]Counsel invite the Court to consider whether sentencing a minor to die constitutes a per se violation of the Eighth Amendment of the Federal Constitution. We decline. Battle and Lashley state the law in Missouri barring contrary adjudication in the United States Supreme Court. See Thompson v. Oklahoma, No. 86-6169, cert. granted, 107 S.Ct. 1284-85 (1987).

565.032.2(7), RSMo 1986. Battle is different from this case. Nancy Allen was not sexually abused before or after the murder, compare State v. White, 694 S.W.2d 802 (Mo. App. 1985) (indications victim may have been sexually molested after death; defendant, seventeen received life sentence), with sub judice and Battle; and, no evidence indicated Mrs. Allen suffered for any prolonged period after Wilkins attacked her. Indeed, the coroner indicated she may have been dead by the time defendant imparted the last wound. Certainly this killing, however senseless, was no more repulsive than those involved in State v. Beck, 687 S.W.2d 155 (Mo. banc 1985), cert. denied, 106 S.Ct. 2245 (1986) (nineteen-year old shot and killed elderly couple; life sentence); State v. Greathouse, 627 S.W.2d 592 (Mo. 1982) (seventeen-year old struck uncle with ax, then shot him eight times; life sentence); State v. Baskerville, 616 S.W.2d 839 (Mo. 1982) (Nineteen-year old; triple-murder; life sentence); State v. Allen, 710 S.W.2d 912 (Mo. App. 1986) (sixteen-year old, given life imprisonment; insisted after robbing couple, aged 67 and 68, that they be killed "the way Muslims kill people --by tying 'their ankles [?] to their feet'", laying each on stomach, then stabbing each in back of neck); State v. Hurt, 668 S.W.2d 206 (Mo. App. 1984) (nineteen-year old, penitentiary inmate, killed cellmate by stabbing him more than sixty times; life term imposed); State v. Scott, 651 S.W.2d 199 (Mo. App. 1983) (sixteen-year old; life imprisonment; robbed elderly couple at gunpoint, then stabbed wife twenty-two times; husband, also stabbed multiple times, survived).

In State v. Lashley, 678 S.W.2d 712 (Mo. banc), cert. denied, 469 U.S. 873 (1984), the victim was stabbed in an area of her head where a section of skull had been surgically removed, exposing a "soft spot."

Defendant was "seventeen years and one month old" as of the killing. His motive was to rob his fifty-five-year old, handicapped cousin; he did so in a manner described as "classic lying in wait." Id. at 716. Wilkins' crime fits this genre. See § 565.032.2(4), RSMo 1986. But more is involved here, making Lashley distinct.[9] In none of the above, Lashley, Battle, Blair, Beck, Greathouse, Baskerville, Allen, Scott, Hurt, or White, was the nature of the defendant such as to raise serious question, as here, whether the defendant should be held so completely responsible for his conduct that we should affirm his sentence.[10]

At age ten, Wilkins was referred to Tri-County Mental Health Center. For the next four to five years, excepting a seven-month probationary period at home, defendant underwent evaluation, treatment and detention at various Missouri institutions. He was diagnosed as possessing a borderline personality,

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[9]We also note "the issue . . . is not whether any similar case can be found in which the jury imposed a [death] sentence, but whether the death sentence is excessive or disproportionate in light of 'similar cases' as a whole." State v. Mallett, ___ S.W.2d ___, ___ (Mo. banc 1987) (No. 68030, decided June 16, 1987) (slip op. at 32-33).

[10]We do not ignore the carefully-planned and carefully-executed nature of this heinous offense. Nor do we take lightly defendant's apparent disregard for the lives of others. We find only that Wilkins' age, his mental and emotional instability, and extensive drug use coagulate, inseparably, to quicken the conclusion, in our view the only conclusion, that the ultimate price is an excessive one to be levied on this defendant.

schizotypal personality, and perhaps developing schizophrenia.[11] He was withdrawn, isolated, depressed, impulsive, displaying intermittent episodes of paranoid functioning. On at least two occasions, he was prescribed antipsychotic medication. Officials at Crittenton Center expressed concern that defendant was at risk for violent, destructive, or self-destructive acts.[12] Indeed, Wilkins had on a number of occasions attempted suicide by cutting his wrist, overdosing on medication or illegal drugs, and leaping from a bridge into the path of a passing car.

Dr. Logan, who examined defendant to determine his competence to proceed below, intimated that Wilkins' heavy drug use was tied to his cognitive functioning.[13] Dr. Parwatikar, who interviewed Wilkins

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[11]Wilkins' brother was diagnosed a schizophrenic in 1982. His father was committed for a period of time in an Arkansas mental facility. On these bases, one examing psychiatrist suggested defendant's dysfunctioning may have a genetic component.

[12]Examining psychiatrist William Logan indicated these actions were intimately bound with defendant's disorder.

[13]Defendant had used marijuana since he was five. He had abused inhalants, stimulants and depressants since age six. In the three summers prior to 1981, he estimated he had inhaled gasoline fumes on about 500 occasions. Since at least age ten or eleven, Wilkins had used LSD, by admission his favorite drug. On July 27, 1985, defendant ingested a home-made strain of the drug three times,

at this Court's instance to determine his competency to waive appellate counsel, suggested defendant's youth, in turn, was a feature which distinguished his mental and emotional make-up from a mere antisocial condition.

Dr. Logan testified below that Wilkins "suffered from an ongoing emotional disturbance" of "profound" proportion; he reported that defendant's actions on July 27, 1985, could not be divorced from his psychopathology. Even though Wilkins' condition could not be termed a legally recognized mental disease or defect, Chapter 552, RSMo 1986, Logan submitted in his report that:

> This is not to say that defendant did not suffer from significant impairment in his mental functioning as a result of mental disease which at the time of the crime hindered his emotional realization of the nature, quality, and wrongfulness of his conduct, and hindered his cognitive control of his conduct . . . "

On these facts, considering defendant's age, and his significant cognitive-emotional disorder, and connected, extensive drug abuse, we hold the sentence excessive and disproportionate. Consistent with this holding, we reduce Wilkins' sentence to life

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significant only to the extent it was a product of Wilkins' disorder, and to the extent it lends greater force to our conclusion, considered in tandem with the other factors we find persuasive in reducing sentence.

imprisonment without possibility of probation or parole barring executive act.[14]

After argument and submission, this cause was assigned to me for opinion. That opinion, which is set forth above, was rejected by the majority of the Court.

I respectfully dissent.

Robert T. Donnelly, Judge

[14]Defendant's desire to obtain the death penalty is noteworthy only in that we find it impertinent to this or any review under section 565.035. This Court will not permit a defendant to employ the judicial process as a vehicle for state-aided suicide.

Supreme Court of Missouri
en banc

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 68393
	)	
HEATH A. WILKINS,	)	
	)	
Appellant.	)	

DISSENTING OPINION

I respectfully dissent. The principal opinion treats this case as though it were here on appeal, which it is not, and in my opinion, glosses over our statutory duty to make examination as to proportionality of the sentence. § 565.035.3(3), RSMo 1986. I concur in the separate dissenting opinion of Blackmar, J. and the separate dissenting opinion of Donnelly, J.

The record before us is a documentary of defendant-"appellant's" exposure to and his failure to respond to almost every known social program of this society during the first almost seventeen years of his life. Regardless of the current belief of many that the death penalty is a deterrent to crime, utilization of the death penalty in cases such as this only serves to bury and cover up the failures of our existing social and penal programs. The death penalty was never intended to punish crimes committed by juveniles and is totally disproportionative to the punishment of similar crimes committed by those of similar age. See cases cited in

separate opinions of Donnelly, J. and Blackmar, J. The punishment should be reduced to life imprisonment.

WARREN D. WELLIVER, Judge

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CASE NO. 68393
	)	
HEATH A WILKINS,	)	
	)	
DEFENDANT.	)	

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI, AT LIBERTY
SEVENTH JUDICIAL CIRCUIT - DIVISION ONE
HONORABLE GLENNON E. McFARLAND - JUDGE

STATE OF MISSOURI,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CASE NO. CR185-491FX,
	)	492FX & 493FX
HEATH A WILKINS,	)	
	)	
DEFENDANT.	)	

TRANSCRIPT OF PROCEEDINGS ON PLEA OF GUILTY AND SENTENCE OF DEATH

APPEARANCES:

FOR STATE	FOR DEFENDANT
MR. LARRY HARMAN AND MR. JAMES B. CHANCELLOR AND MICHAEL WRIGHT PROSECUTING ATTORNEY'S OFFICE CLAY COUNTY LIBERTY, MISSOURI 64068	MR. FRED DUCHARDT PUBLIC DEFENDER CLAY COUNTY LIBERTY, MO 64068 AND DEFENDANT PRO SE

Jerry W. Davis
Official Court Reporter
Division One, Seventh Judicial Circuit
Liberty, Missouri

INDEX

ARRAIGNMENT 3
[App. 220]

DOCKET SHEET ENTRY, DECEMBER 23, 1985 . 5
[App. 222]

COMPETENCY HEARING, APRIL 16, 1986 6
[App. 222]

DEFENDANT'S EVIDENCE ON COMPETENCY . . 8
[App. 224]

DR. STEVEN MANDRACCHIA

DIRECT EXAMINATION 8
[App. 224]
CROSS-EXAMINATION 14
[App. 231]

DR. WILLIAM S. LOGAN

DIRECT EXAMINATION 15
[App. 232]
CROSS-EXAMINATION 29
[App. 245]
REDIRECT EXAMINATION 34
[App. 250]
RECROSS-EXAMINATION 38
[App. 254]
FURTHER REDIRECT EXAMINATION . . . 39
[App. 255]

DEFENDANT FOUND COMPETENT TO PROCEED 42
[App. 257]

DEFENDANT'S PRO SE MOTION, APRIL 16, 1986 42
[App. 257]

DEFENDANT'S PRO SE MOTION, APRIL 23, 1986 69
[App. 280]

DEFENDANT FILES WRITTEN WAIVER OF COUNSEL 84
[App. 294]

PETITION TO ENTER PLEA OF GUILTY GIVEN TO DEFENDANT, APRIL 29, 1986 96
[App. 306]

GUILTY PLEA HEARINGS, MAY 9, 1986 104
[App. 312]

EXAMINATION OF DEFENDANT BY COURT IN CR185-491FX 116
[App. 322]

EXAMINATION OF DEFENDANT BY MR. CHANCELLOR 139
[App. 347]

EXAMINATION OF DEFENDANT BY COURT IN CR185-492FX 145

EXAMINATION OF DEFENDANT BY COURT IN CR185-490FX 154

SENTENCING IN CR185-490FX, JUNE 27TH, 1986 167

SENTENCING IN CR185-492FX, JUNE 27TH, 1986 176

SENTENCING IN CR185-491FX, JUNE 27TH, 1986 178

STATE'S EVIDENCE AT SENTENCING HEARING 194

STEVEN HANDLEY

DIRECT EXAMINATION 194

DR. PAUL C. VESCOVO, JR.

DIRECT EXAMINATION 200

RON NICOLA

DIRECT EXAMINATION 214
CROSS-EXAMINATION 228

ROBERT H. ALLEN

DIRECT EXAMINATION 230
CROSS-EXAMINATION 232

TOM RUCCI

DIRECT EXAMINATION 233

LINDA HAZELETT

DIRECT EXAMINATION 239
CROSS-EXAMINATION 240

JOHN CARTON

DIRECT EXAMINATION 241
CROSS-EXAMINATION 243

DR. STEVEN MANDRACCHIA

DIRECT EXAMINATION 245

DR. WILLIAM S. LOGAN

DIRECT EXAMINATION 248
CROSS-EXAMINATION 274

STATE RESTS ON SENTENCING HEARING .. 277

DEFENDANT'S EVIDENCE ON SENTENCING . 278

PATRICK K. STEVENS

EXAMINATION BY THE COURT 278
DIRECT EXAMINATION 279
DIRECT EXAMINATION RESUMED 288

DEFENDANT RESTS 289

ARGUMENT FOR STATE 289

COMMENTS BY DEFENDANT 294

SENTENCING BY COURT 298

CERTIFICATE OF REPORTER 303

INDEX TO EXHIBITS

NUMBER	ITEM	MARKED	RECEIVED
STATE'S 1	PHOTO	169	196
STATE'S 2	PHOTO	169	196
STATE'S 3	PHOTO	169	197
STATE'S 4	PHOTO	169	198
STATE'S 5	PHOTO	169	198
STATE'S 6	PHOTO	169	199
STATE'S 7	PHOTO	169	NOT OFFERED
STATE'S 8	PHOTO	169	NOT OFFERED
STATE'S 9	PHOTO	169	202
STATE'S 10	PHOTO	169	207
STATE'S 11	PHOTO	169	208
STATE'S 12	PHOTO	169	208
STATE'S 13	PHOTO	169	209
STATE'S 14	PHOTO	169	NOT OFFERED
STATE'S 15	PHOTO	169	NOT OFFERED
STATE'S 16	PHOTO	169	210

STATE'S 17	PHOTO	169	211
STATE'S 18	PHOTO	169	212
STATE'S 19	PHOTO	169	212
STATE'S 20	PHOTO	169	NOT OFFERED
STATE'S 21	MIRANDA WAIVER	173	230
STATE'S 22	STATEMENT OF WILKINS	173	230
STATE'S 23	TRI-COUNTY RECORDS	239	NOT ADM. 241
STATE'S 24	CRITTENDEN CENTER RECORDS	245	245

The following proceedings came on before the Honorable Glennon E. McFarland, Judge of Division One of the Seventh Judicial Circuit of Missouri, at Liberty, on Thursday, October 17th, 1985.

The Defendant appeared in person and by attorney, Mr. Fred Duchardt.

The following proceedings were had:

(State announces ready for trial on all cases set for arraignment.)

ARRAIGNMENT

THE COURT: CR185-492, 490, and 491, State versus Heath Wilkins, also known as Pyzon.

MR. DUCHARDT: Good morning, your Honor.

THE COURT: Good morning.
Are you Heath A. Wilkins?

DEFENDANT: Yes, sir.

THE COURT: Mr. Wilkins, of course you have a right to remain silent. You do not have to incriminate yourself. Whatever you say can and will be used against you through the entire proceeding.

Mr. Duchardt, are you ready to proceed with arraignment?

MR. DUCHARDT: Yes, your Honor. I would ask that the charges be read to Mr. Wilkins.

THE COURT: In the first case, that being CR185-491FX, Mr. Wilkins, you're charged by information of the prosecuting attorney's office charging that you have committed the Class "A" felony of murder in the first degree in that on or about July 27th, 1985, in Clay County, Missouri, that you after deliberation knowingly caused the death of Nancy Allen by stabbing her.

MR. DUCHARDT: Judge, as to that charge Defendant would enter a dual plea of not guilty by reason of mental disease or defect excluding responsibility, and not guilty.

I would ask leave at this time to file with the court a motion for mental examination and a proposed order in that regard.

THE COURT: Do you want this set for any particular day?

MR. DUCHARDT: Judge, I'm not certain, under the circumstances there is some question in my mind of whether Mr. Wilkins is competent to proceed at this point.

The court may very well wish to go ahead and set a date for sure.

THE COURT: I'll set it for the 27th of January then so we don't forget him.

He probably will be back from the state hospital by then, I presume.

MR. DUCHARDT: I'd presume so.

THE COURT: I've made this entry, "Comes now State by assistant prosecutor and defendant in person and by attorney, Fred Duchardt. Defendant arraigned and defendant enters plea of not guilty and not guilty by reason of mental disease or defect excluding responsibility. State announces ready and cause set for trial the 27th day of January, 1986, at 9 o'clock a.m. Defendant ordered to appear for docket call on January 22nd, 1986, at 9 o'clock a.m.

Ordered that defendant be examined at state hospital as per entry filed."

(Defendant arraigned in case number CR185-490 FX and CR185-492FX and enters plea of not guilty by reason of mental disease or defect excluding responsibility and not guilty and cases set for trial on the 27th day of January, 1986, with docket call set for January 22nd, 1986.)

* * * * * * * * * * *

DOCKET SHEET ENTRY

"Dec 23 1985 Comes now State by assistant prosecuting attorney and defendant in person and by attorney, Kevin Rotert. Copy of report from state hospital given to defendant. Defendant granted leave to have further examination at defendant's cost."

* * * * * * * * * * *

The following proceedings came on before the Honorable Glennon E. McFarland, Judge of Division One of the Seventh Judicial Circuit of Missouri, on Wednesday, the 16th day of April, 1986.

The defendant appeared in person throughout these entire proceedings and by Mr. Fred Duchardt.

THE COURT: CR185-490, 491, and 492, State versus Heath Wilkins, also known as Pyzon in each case.

You may call your first witness. This is in regard to----

MR. CHANCELLOR: His competency to stand trial, I believe, your Honor.

THE COURT: And this is in regard to the defendant's competency to stand trial, is that correct?

MR. DUCHARDT: Judge, as you'll recall we filed a motion asking for a determination of both issues, both competency to proceed and competency at the time of the alleged offense.

And Doctor Steven Mandracchia of the Western Missouri Mental Health Center completed a report and filed same with the Court.

And then upon my request the Court allowed an independent psychiatric examination be conducted. And Doctor William Logan of the Menninger Foundation completed that report. That's the one that you have there in your hand.

My proposal is that the Court, I think the Court initially needs to take up the issue as to competency to proceed.

I think that the two issues are probably intermingled, so we'll probably go into some of the matters concerning both, but---

THE COURT: And you think it's in my province now to determine his mental competency at the time of the alleged offense?

MR. DUCHARDT: No, sir, that's what the motion was concerning and that was, and what the reports concern.

THE COURT: Very well.

MR. DUCHARDT: And they concern both. But, as is recognized under the statute, but the only thing I was saying is that because of the intermingling of the issues we'll probably get into both.

But, I think the only determination that needs be made at this point is Mr. Wilkins' competence.

THE COURT: Very well. You may proceed, whichever side wishes to proceed.

MR. DUCHARDT: I'll take the lead.

MR. CHANCELLOR: Go right ahead.

DEFENDANT'S EVIDENCE ON DEFENDANT'S COMPETENCY

DR. STEVEN A. MANDRACCHIA, being first duly sworn by the deputy circuit clerk, testified as follows:

DIRECT EXAMINATION BY MR. DUCHARDT

Q. Doctor Mandracchia, would you state your name, please, for the court?

A. Steven Mandracchia.

Q. And your occupation, sir?

A. I'm a clinical psychologist for the State of Missouri, Department of Mental Health.

Q. And where are you practicing at present?

A. At the Western Missouri Mental Health Center on 22nd Street, Kansas City.

Q. And how long have you been there, sir?

A. Since July of 1982.

Q. You have testified in this court before as an expert in the field of psychology, is that correct, sir?

A. Yes, I have.

Q. What I wanted to do was go into your examination of Heath Wilkins pursuant to this Court's order. Do you recall doing that?

A. Yes, I do.

Q. And could you tell the Court when you spoke with Mr. Wilkins and had an opportunity to examine him pursuant to the Court's order?

A. Okay, I saw Mr. Wilkins in January, excuse me, in November, 1985.

Q. All right, sir.

A. November 27th, 1985.

Q. Would you describe the setting and the circumstances under which you spoke with Mr. Wilkins?

A. Mr. Wilkins was escorted to our hospital and to my office in the hospital by jail officials. And we engaged in a clinical examination, personal interview, mental status examination pertaining to issues requested by the Court order.

Q. All right, sir, how long of a time did you yourself have an opportunity to speak with Mr. Wilkins?

A. We were together in a clinical interview for approximately an hour and thirty-five minutes.

Q. All right, sir. And did you or one of your staff members conduct any psychological testing or anything of that sort?

A. Yes, psychological testing was performed, I believe immediately afterwards.

Q. All right, sir, and what were the psychological tests that were performed?

A. Mr. Wilkins was given the Minnesota Muliphasic Personality Inventory, known as the MMPI.

Q. All right, sir. Any other psychological testing?

A. Not that I recall.

Q. Any type of physical testing of Mr. Wilkins that was done?

A. No, we rely purely on background information, past medical records, and physical examinations.

Q. All right, sir. You also, I believe, were provided some information by my office concerning past history of psychological problems for Mr. Wilkins, is that correct, sir?

A. That's correct.

Q. Could you described briefly the types of information that was provided to you in that regard?

A. The types of information was primarily from residential treatment centers, youth homes, and whatever psychological, psychiatric, education and psycho-social evaluations were done at their request.

Q. All right, sir. And I believe you were also provided with a copy of the police reports concerning the incident, is that correct, sir?

A. That's correct.

Q. Any other information other than those things that I described that were provided to you to assist you in making your findings for the Court?

A. Well, I assume that the information that I reviewed from treatment centers was all from your office.

The only other thing would be a psychiatric social worker's report that was done in our office solely, specifically for this evaluation.

Q. All right, sir. Based on the information that was provided to you, did you determine whether or not in your opinion Heath Wilkins is suffering from any type of mental disease or illness?

A. Yes, I did.

Q. All right, and what was your determination or opinion in that regard, sir?

A. My opinion was that there was no evidence of mental disease or defect as defined by Chapter 552 of the Revised Statues of the State of Missouri.

Q. How about any type of mental illness as would be recognized by your profession but not necessarily cognizable under Chapter 552?

A. I made no opinion of that.

Q. Do you have an opinion as to that?

A. I could form an opinion which would basically be to agree with the past treatment records and past psychiatric and psychological diagnosis.

Q. All right, sir. At this time do you have an opinion as to Mr. Wilkins' competency to proceed before Judge McFarland in the proceedings heretofore?

A. Yes, I do.

Q. And what is that opinion, sir?

A. My opinion, qualified by my saying based on the evaluation that was performed in November and information available to me then, was that he is competent to proceed.

Q. Okay. Has information come to your, come to your knowledge at this time that would make you doubt that initial finding?

A. No, nothing.

Q. Specifically, I've informed you concerning Mr. Wilkins' desire to, putting it simply, plead guilty and attempt to receive the death penalty on his behalf. I have related that information to you, have I not?

A. Yes, you have.

Q. In light of that additional information, does that affect your opinion as to Mr. Wilkins' competency to proceed?

A. No, it does not.

Q. At this time do you feel that he has a full understanding of the charge against him and a full understanding of the nature and

consequences of his actions should he choose to enter a plea of guilty as he has indicated he wishes to do?

A. I don't understand, if you could rephrase that for me?

Q. I'm asking it that way specifically for a reason. Do you feel that he has the full understanding of what he is doing, or do you feel that his understanding of things is somewhat limited, though possibly he might have the ability recognized under law to proceed, do you feel that he has some limited capabilities of understanding, some limitations on his capabilities?

A. I, no, I don't feel that he has any psychological or intellectual or cognitive limitations on his capabilities, no.

Q. All right, sir. So, putting it simply, as you put it in your report, you do believe that he is at this time that he is competent to proceed to trial?

A. Yes, I do.

Q. Without any reservations, or do you have some reservations concerning it?

A. I would rather address particular reservations, but as a general statement, no, there are no cautions or reservations that I think, that I'm aware of.

Q. No, I'm asking specifically if you, if you are making that finding with any reservations on your part, or if it's, if you're confident in that finding?

A. I'm confident in that finding.

MR. DUCHARDT: Nothing further at this time, your honor.

CROSS-EXAMINATION BY MR. CHANCELLOR:

Q. Doctor, do you feel confident that the defendant knows if he does enter a plea of guilty to at least the murder charge that he knows he can receive the death penalty?

A. Yes, I believe he knows he can receive the death penalty, yes.

Q. And that he, it has been raised that he wants to receive the death penalty, is that right?

A. That, Mr. Duchardt had informed me of that.

Q. And, again, you feel that he is competent to proceed with whatever plea is made?

A. I'm sorry?

Q. You do feel he's competent to proceed with whatever plea, whatever decision that he wants?

A. Again, I'm not understanding, competent to proceed with his decision?

Q. Do you think----

A. Do you mean is he competent to make, to arrive at that decision?

Q. Yes.

A. Yes.

MR. CHANCELLOR: Okay. I have no further questions.

MR. DUCHARDT: Nothing further of the doctor at this time.

THE COURT: You may step down, call your next.

(witness excused.)

(Court takes up another matter on the docket.)

(The following proceedings were had with all parties present as hereinbefore.)

THE COURT: Back to CR185-490, 491, and 492, State versus Heath Wilkins, also known as Pyzon.

Are you ready to proceed?

MR. DUCHARDT: Yes, sir.

THE COURT: Call your next witness.

DR. WILLIAM S. LOGAN, being first duly sworn by the deputy circuit clerk, testified as follows:

DIRECT EXAMINATION BY MR. DUCHARDT:

Q. Doctor Logan, would you state your name, please?

A. William S. Logan, M.D.

Q. And your occupation, sir?

A. Psychiatrist and Director of Law and Psychiatry at the Menninger Foundation.

Q. All right, sir. Would you briefly give your medical background for the Judge and your practical experience background so that he'll be aware of those things?

A. My undergraduate degrees were from New Mexico State University in microbiology and psychology in 1972.

I graduated from medical school at the University of Texas Health Science Center in Dallas in 1977. I completed four years of psychiatry residency between 1977 and 1981 at Timberlawn Psychiatric Hospital also located in Dallas.

For three years following that I was the forensic psychiatrist at the United States Medical Center for Federal Prisoners in Springfield, Missouri, where I did these types of evaluations for the federal district courts around the country.

From mid 1984 until mid 1985 I did a fellowship in forensic psychiatry at the Menninger Foundation. And then in July 1985 I became the

Director of the Law and Psychiatry department of the Menninger Foundation.

Q. All right, sir. And did I contact you and request that you conduct an evaluation of Heath Wilkins concerning his competency to stand trial and his competency at the time of the offense pursuant to the dictates of Chapter 552 of the Revised Statutes of Missouri?

A. Yes.

Q. All right, sir. And would you describe to Judge McFarland what steps that you took in conducting your evaluation of Mr. Wilkins?

A. The first step was a psychiatric interview which took place, I believe it was on March 20th, for five hours where I covered his past history, the circumstances surrounding the current event, and an evaluation of his mental status.

Also an associate from the Menninger Foundation, Doctor Melvin Berg, came in and conducted about six hours of psychological tests.

The tests he conducted, I believe, included the Thematic Apperception Test, the Rorschach test, Animal Choice test, and an intelligence test abbreviated the WAIS-R, or Wechsler Adult Intelligence Scale, Revised.

That took around six hours and was administered two days later on March 22nd, 1986.

There were also a number of records that were reviewed in conjunction with the evaluation, including evaluation records that went back as far as August of 1979 where he was evaluated at the Platte County Mental Health Center.

And that was followed by an inpatient evaluation at the Western Missouri Mental Health Center.

For the next three and a half years there were, he was at the Butterfield Youth Services. Their records were quite extensive and included progress reports, letters to the court, psychological testing, school records, psychiatric records, and a discharge summary.

And he then for about a six month period of time from May of '83 until November of '83 was at the Crittendon Center in Kansas City.

They likewise included school records, psychological testing, psychiatric evaluations. And, finally, there was an evaluation in December of 1985 from Western Missouri Mental Health Center.

Q. All right, sir. And on the basis of your personal contacts with Mr. Wilkins and the information provided you, both by Doctor Berg and also the data that you're describing, did you reach a conclusion based upon that information as to your opinion as to Mr. Wilkins' competency to proceed in these proceedings before Judge McFarland?

A. I did not reach a definite conclusion.

Q. And that was what I was going to get to. And I'll just let you put it in your own words as to the opinion which, the opinions which you drew on the basis of everything that you saw. And I'll just leave it to you to go ahead and describe that.

A. Looking at the specific issue of his competency to proceed, I looked at both his cognitive understanding of the issues involved and his emotional understanding, particularly his cognitive understanding of the issues involved in being competent to stand trial seemed to be intact.

These would be things such as what the actual charges were against him, how well he understood those. He understood what he was being charged with in this Court.

He understood the potential penalty if he was convicted, particularly in this case that he could receive the death penalty.

He additionally knew the pleas that were open to him. He knew the roles of the various officers of the court and what their function was, what their purpose was in the courtroom.

He had a general layman's appreciation of the phrase, court proceedings, that would take place.

In terms of being able to cooperate with his attorney, his memory was sufficient to give a

fairly accurate and detailed recounting of the events which happened around the time that would allow his attorney to prepare a defense.

He also seemed to have a fairly good working relationship with his attorney with one exception.

Emotionally he indicated that he wanted to plead guilty and receive the death penalty. In this regard he did not see his attorney as working in his own best interest but really working against his own interests.

His wish to die was based in part upon some discouragement and depression about his current situation. Some of that discouragement and depression is seemed justifiable.

He did not want to go to a prison or to a mental institution. He'd had quite a bit of experience with mental institutions in the past and had no desire to return there.

He also felt that he was a liability to several of the other defendants in the case. And, finally, that he deserved to die.

There were several factual errors, not delusions but just errors of fact. He thought that his girlfriend was being charged with a lessor crime and that she actually did, by him pleading guilty he would, and being executed, he would get out of her life and allow her to detach and sort of go on with her own life.

He also expressed a good deal of guilt about his destructiveness, particularly in damaging his girlfriend and the other two or three co-defendants, she being one of them. And also the damage that he'd brought upon the victim.

He did not see any viable alternatives for himself and described being incarcerated for a long period of time as being like tortured.

He did not really have an appreciation of the extent to which society may have an interest in his existence in the case or the fact that others may have concerns about his, about his plea.

He primarily saw his wanting to enter a plea of guilty and receive the death sentence as an exercise of his own personal freedom to make that kind of choice without any other kinds of considerations being really entertained.

So, to some degree this is a very impulsive individual who really doesn't think through the consequences of some of his decisions. And that may apply also in this case in the sense that he had little appreciation of the appellate process in the death penalty or appreciation of the fact that down the line the, his sentence might be overturned by a higher court.

So, he had no realization that he would be spending quite a bit of time on death row even if he took this matter. He seemed to think that the

imposition of sentence would be rather immediate and that he would be able to get out of a period of incarceration which he found distasteful.

So, for those, to that extent there seems some emotional impairment where he would not be acting in necessarily his own best interests.

So, really, weighing the two factors, he has a fairly good cognitive and rational understanding of what court procedures are about, but there are some emotional things involved that could interfere with his decision making process at certain critical points.

That being the case, I thought it would be better to describe both and leave the decision to the proper person, the judge in the case.

Q. All right, sir. Specifically about the impulsivity, Doctor Berg described this in some considerable detail, am I correct, in his report?

A. Yes.

Q. Specifically indicating that in various of the psychological tests, that basically the impulsiveness which he described is demonstrated.

Could you describe how those tests which Doctor Berg ran and the conclusions which he drew jive with what you were just describing for the Court?

A. Well, I don't think I reviewed his testing specifically to give a presentation on those issues, but, briefly looking over his report, one of the things in looking at his intellectual functioning, particularly on the intelligence test, his answers to questions were very impulsive. He just sort of did them in a very glib manner. He didn't really channel much thought or put much effort into his answers.

There was a wide discrepancy between what we call his verbal I.Q. and his performance I.Q., which really reflects a very impuslive, poorly thought out kind of cognitive style.

I think that was the one area where it really showed up most prominently is, was in trying to answer questions on an intelligence test that required some thought and some ability to work and synthesize material.

Either he was, one, not able to do that, or, two he had the ability but had never practiced doing that, and, so, he was not good at doing that. Or, three, he had no desire to do that, or a combination of those.

Q. Would it be a fair statement, and I'm kinda paraphrasing a little bit from Doctor Berg's report, but while Mr. Wilkins may very well have the cognitive abilities, because of his background and emotional development and upbringing, to the extent that he's got them he doesn't use them, is that, would that be a fair way of putting it?

A. Yes, he's really had no kind of supervision or tutoring or guidance in terms of how to use his mind to make rational common sense decisions.

Q. And, so, is it a fair statement that you describe, you kind of do a dual situation in describing his competency to proceed; one on the cognitive side and one on the emotional side.

Is it a fair statement that Mr. Wilkins is really operating on that emotional side that you've described rather than in a cognitive manner?

A. I think in terms of when it comes to making sort of critical decisions he's very easily frustrated and prone to give out and just take the quick, easy solution primarily based on how he feels and not on what he thinks or what might be the wisest course of action.

Q. And is this situation that both you and Doctor Berg detected, is that also borne out in the other information from Mr. Wilkins' stays in the other psychiatric settings that he's had?

A. Yes, and also at the local Butterfield Youth Services where he was engaged in school work. And they reviewed that on a regular basis. And they found that he didn't have much of an ability to retain things that he read, that he wouldn't do homework, that he wouldn't focus his attention to any great length of time on anything that required some mental discipline.

Q. Now, in your findings and recommendations, both on your cover page of your report and also later in the report, you indicate a need for extensive inpatient treatment for Mr. Wilkins.

Could you describe what type of situation that you would, in more detail anyway, what type of situation you would feel that he would need?

A. Very early on Mr. Wilkins was evaluated by psychologists at Tri-County Mental Health Center. They noticed, and this would've been about age 10, they noted the presence of both some homicidal potential in this young man and some suicidal potential.

A psychologist at that point felt that he really needed pretty intensive psychotherapy, somebody who was pretty skilled and who could see this boy on a very regular basis and start to work through some of those conflicts, particularly those surrounding his family life, especially his mother whom he had contemplated killing and actually had made some preparation toward killing her even at the age of 10.

It was finally determined about six months later that he should go to Butterfield Youth Services. But, the type of treatment he received there, although it had some structure to it, was mostly a, what we call an milieu treatment.

In other words they have a number of activities and your privilege level depends pretty much on your behavior. You're rewarded for

good behavior and you're punished for poor behavior.

The records reflect that he did have some counseling, but this was not with a highly skilled person. He went through the privilege system at times doing better, at times doing worse.

He did not want to talk about his family situation. And that was really never discussed. And his family was pretty much uninvolved in any kind of treatment with him.

In order to make some kind of difference in this man's life, he would have to be not only placed in a fairly secure setting where he couldn't dispel his frustrations and anxieties and depression through drug taking as he did at the youth home, or through thefts or other kinds of sort of dangerous, risk taking activities, things that would provide some kind of excitement, that would have to be curtailed.

Then if that was curtailed he would show major depression and you would have something you could work with on a fairly intensive basis in psychotherapy.

Even under this kind of treatment program the prognosis would be poor due to the chronicity of this young man's problems which began, at least as far as we can tell, at the age of 5 or 6, if not before.

But, this type of treatment would offer whatever hope there is for some kind of improvement in his personality.

Q. Again, just so that I can make sure that I understand and the record will properly reflect it, the type of treatment that you're talking about that Mr. Wilkins needs was proposed as early on as age 10 and just never, for one reason or another, wasn't delivered, just was never, never actually utilized, is that correct?

A. They, he was placed in the usual facilities for kids who have problems at that age. His problems were more severe than that system was able to effectively treat.

Q. And, specifically, in the reporting they acknowledge it, their failure in that regard, is that correct, sir?

A. Particularly the psychiatrist at the Butterfield Youth Services who had contact with Mr. Wilkins over about a three and a half year period noted that they had never really made contact with him, particularly, specifically, rather, he said that he doubted that he had been involved, perhaps, as early as the beginning of his treatment there.

His behavior, in fact, deteriorated at the Butterfield Youth Services Program over that three and a half year period. Initially they described him as being a somewhat an outgoing person who was friendly.

His prior history reflected that in school he had not been a major behavior problem. Over the ensuing several years he became a major behavioral problem. He became withdrawn. His drug abuse, if anything, increased to the point where there was frequent use of hallucinogens and inhalants, things like gasoline, locker room cleaner, and other types of things.

His I.Q. actually decreased during that period around twenty points, I suspect from drug usage and inhalant abuse particularly causes brain damage.

MR. DUCHARDT: No further questions at his time, your honor.

CROSS EXAMINATION BY MR. CHANCELLOR:

Q. What did you find his intelligence level to be now?

A. His intelligence level now is, overall is in the average range. His performance level is actually in the above average, but his verbal skills it's sort of in the low normal range.

Q. Okay. So----

A. Not in a range that would render him incompetent to stand trial on that basis.

Q. Okay. So, intelligence wise he is average, above average, in that range?

A. His verbal skills, which are the, primarily the ones, the skills that would be utilized in this kind of setting, are in the, oh, lower end of the normal range.

Q. Now, awhile ago when Mr. Duchardt talked to you, by the way, when you talked to him you knew that he was seeking the death penalty, didn't you?

A. He told me that.

Q. Okay. And he had made this decision a few months ago. I don't know whether you knew that or not?

A. I didn't know when he had made the decision.

Q. And then in Mr. Duchardt's office awhile ago you compared this to possibly like a cancer patient. Could you explain that to the Judge?

A. Yes. This tends to be a fairly difficult kind of situation to deal with in a legal setting because there is often not a lot of familiarity with it.

And an analogy that I draw upon out of my own medical experience would be that of the terminal cancer patient who is faced with a rather poor prognosis, but maybe a slim possibility of some hope but with extensive, often painful chemotherapy or radiation.

But, they decide that they don't want to go through that, that the chances are not good enough. They are depressed and discouraged

and refuse treatment and say I'd rather just go ahead and die.

In some ways that's the situation Mr. Wilkins finds himself in, realizing to some degree or extent his problems, feeling some guilt and remorse and depression for what has happened, and seeing a fairly bleak future for himself and not wanting to undergo the, what he described as torture of long term incarceration, he has elected not to put up a defense but rather would plead guilty to the charges.

Q. But, do you see this as some sort of a logical decision by him?

A. The distinction, I suppose, becomes one of whether it's a rational decision. And that I will leave to wiser souls than I. But, it makes sense on the surface of it if viewed from the one perspective.

Q. Okay. In other words he'd rather spend as little time in prison as possible and take the death penalty and not go through what he thinks would be the torture of life in prison, is that, is that kinda the bottom line?

A. Roughly, yes, with the additional component that I do not believe he has a very good understanding of the fact that even if he were to take that route he would still spend a considerable amount of time in terms of years on death row.

He seemed to expect that the sentence would be rather, administered rather quickly and would not involve a lot of waiting.

Q. Well, that may or may not be, you know, we don't know how many years.

A. But it won't be done next month. I believe that was more of the term he was thinking of.

Q. As far as a, him suffering from a mental disease or defect at the time of the commission of the crime; what's your opinion as to that?

A. I certainly saw him as being psychiatrically ill and there were a number of diagnosis that I described in my report.

The definitions under the laws of Missouri usually reflect a severe thought disorder or a mood disorder, what we call an affective disorder perhaps to the extent where someone is so psychotic at the time they're totally out of touch with reality.

I did not see him, although despite his, you know, the plethora of his mental difficulties, as really falling under that particular definition.

Q. So, are you saying that at the time of the crime that he was not suffering from a mental disease or defect which would render him incapable of appreciating the nature, quality, or wrongfulness of his acts or being able to form his conducts to the requirements of the law?

A. One, I didn't see him as meeting the criteria for a severe mental illness as defined under the Statutes of Missouri.

Assuming that he had met that criteria, the execution of the crime was very puposeful, very deliberate, very well planned. And that showed that he, there are numerous efforts to avoid discovery or detection, showing that he appreciated the wrongfulness of it and also appreciated in a limited way the nature and the consequences of his action in the sense that he was committing a robbery for some profit and performing a murder in the course of that robbery so there would not be any witness.

In terms of really emotionally appreciating the fact that he was killing another human being and a human being with a family and a right to live, he didn't seem to have that kind of appreciation.

Q. In other words it was in your report, and you said, I believe, at the time he murdered this lady he did have no emotion for her, is that what you're saying?

A. Yes. And throughout his history there has been really a characteristic, a pronounced charcteristic that this person has been unable to connect with other people, really to see them as separate human beings that can be rewarding in his life.

He really sees them as someone who can only get in his way and someone he either needs to avoid or eliminate.

Q. I believe he used the analogy of a trash can. Could you tell the Judge what that was?

A. In reporting his thinking at the time, he gave the analogy that he had already thought through his actions and that he did not know this lady personally but had decided that whenever he committed this robbery that he would kill whoever was in the, waiting in the store.

He gave the analogy that if one comes across a trash can and walks around it it may be there in the future to get in your way, but if you kick it and get it out of the way then it's no longer a bother to you.

MR. CHANCELLOR: No further questions.

MR. DUCHARDT: Just one or two more.

REDIRECT EXAMINATION BY MR. DUCHARDT:

Q. Doctor, I just want to make certain. Of course, the component that Mr. Chancellor is talknig about, about the terminally ill patient, is one that you discussed with both of us, is that correct, sir?

A. That's correct.

Q. But, that, I guess maybe the best way of describing it is that while that is one way of looking at it, it's not necessarily the only place that Mr. Wilkins is coming from, is that a fair statement? In other words, he is, while he expresses that, there are some other things

which you have described as the emotional component of his capacity to understand the proceedings that are also there as well. There may be a logical framework to it that's described there, but there is a somewhat illogical emotional component to it as well, is that fair statement?

A. Going back to the analogy of, say, the cancer patient is that they may be in a geat deal of pain. They may be emotionally distressed and that may bear in a significant manner on their desire to give up.

Perhaps with encouragement they may be a small, slight chance of survival. This man doesn't know if he will be able to adjust in prison, for example, and be able to find some gratification there.

It may be that some court procedure will successfully reduce his sentence at some point in the future in the same way that chemotherapy might be effective for a small number of cancer patients.

Without some encouragement in that direction it's unlikely that he will go for that small chance. And, so, that becomes a real difficult question of how much you pursue and how much you encourage and how much, or how much you accept and simply let go is the person's own decision.

Q. And, really, that type of analogy comes from, again, drawing from your analogy, as the two components of this issue, whether he's

competent to proceed, the cognitive side, as opposed to the emotional side; what you're describing, the cancer patient would come from what of the cognitive side is available to him, would that be a fair statement? That's really to an extent a thinking out of it as opposed to the emotional component that you talked about.

A. Well, it's a thinking out of it to the extent that the person is in a great deal of pain and that pain and emotional distress acts as somewhat of a coercional force on the thought process.

And that being the case, they may think it's more expedient or that they don't want to put up with the frustration of trying a riskier and more tedious shot at prolonging their life.

Q. And that brings us to the emotional component of your diagnosis that there are significant emotional problems which come to bear on Mr. Wilkins when he starts to make the important type decisions like you'd have to make in a trial, is that a fair statement?

A. Yes. Specifically in Mr. Wilkins' case his history is just replete with examples of how he is really unable to tolerate any kind of pain, frustration, depression, discouragement.

When placed in these situations he does what we call in psychiatry, acts out his conflicts through events that bring some kind of excitement, some kind of relief in the boredom, extensive drug use, checking out of the situation. Fantasy has been used in describing his past

records where he will simply have a vivid imagination and imagine himself in different roles as a method of coping with some fear.

He even, his name or identity, Pyzon, he described as sort of a alter ego or alternate role for himself where he doesn't have to deal with fear or being vulnerable, but can instead be sort of a macho person who takes charge and whom others fear and respect.

Q. That brings me to my other question for you; Mr. Chancellor was questioning about Mr. Wilkins' competency at the time of the offense.

I believe you described what you were just mentioning, the kind of alter ego situation coming into the decision as to whether he was, in fact, competent at the time of the offense.

Could you kinda expand on that for the Judge a little bit, basically the idea that it was, I think as you described it, and I'm just paraphrasing, he was the alter ego as opposed to himself in a way at the time of the incident.

A. Well, both are really part of himself, but it's almost as a, in order to avoid the situation of stage fright an actor takes on a role that they portray on stage and actually become that role.

He described at the time of the act that he acted in sort of a machine like, automatic fashion. In that regard it further increased the emotional distance from the victim of the crime and became a rather clinical, cold killing of a

person because that's what he had planned to do and that's a role he was acting in at the time.

MR. DUCHARDT: Nothing further, your Honor. Thank you, sir.

MR. CHANCELLOR: Just one question, your Honor.

RECROSS-EXAMINATION BY MR. CHANCELLOR:

Q. It would seem to me, of course I'm not as schooled in this, but any decision any criminal defendant might make or any cancer patient might make, would emotion have some part in that whatever they would do?

A. Surely.

Q. Sure. I mean, no one is going to sit and just make a cold, rational choice without some feeling about it?

A. Some people, I guess, are successful in suppressing their feelings, but it is pretty much a cognitive decision. But, in the average individual there's going to be some emotional interplay.

Q. So, what you're saying is he fully understands what's going on, he understands the consequences of what he wants?

A. In part.

Q. In part. And there's some emotion in him that is playing in there, is that----

A. He wants a real quick solution to this. He doesn't really want to suffer through a long trial or a long incarceration. he wants a quick out. And that is in character of this man.

MR. CHANCELLOR: Okay, no further questions.

FURTHER REDIRECT EXAMINATION BY MR. DUCHARDT:

Q. Just taking that the next step, doctor, this man is not normally developed emotionally, is that a fair statement, from all of the information that you have available to you and from your examination, the type of emotional component that most of us would have in our decision making process that Mr. Chancellor described, this man doesn't have it, is that a fair statement?

A. He has a pretty pervasive developmental defect along the way, particularly stemming out of the kind of home environment and other past experiences that he's had. He really hasn't learned to use his mind in the way an average person would to help him deal with conflicts and help him overcome those.

His style of coping is a rather impulsive trying to get rid of things or change his environment in some way to relieve the distress.

MR. DUCHARDT: Nothing further. Thank you, sir.

MR. CHANCELLOR: No further questions.

THE COURT: You may step down, call your next.

MR. DUCHARDT: These are all of the witnesses available, Judge. Those are the two doctors who have received requests to evaluate Mr. Wilkins.

The Court has their detailed findings in the reports which have been submitted to the Court. I would just note for the Court that in light of Doctor Logan's report and certain details in Doctor Mandracchia's report which would be consistent with Doctor Logan's findings, I think there's some question about Mr. Wilkins' competency to proceed.

Mr. Wilkins, I would note for the record, wishes to be found competent to proceed and I think has made that intention clear to the Court.

Which, of course, as Doctor Logan accurately mentions in his report, has placed Mr. Wilkins and I in a, in really a conflicting type of position.

But, since I have been appointed to represent Mr. Wilkins, these things which Mr. Wilkins may or may not wish me to emphasize I think need be emphasized. I think there's some considerable question as to whether or not this man is competent to make the kinds of choices particularly that come to bear in a capital case as is before the Court.

THE COURT: Anything from the State?

MR. CHANCELLOR: Yes, your Honor. Based on the two doctors you've just heard, in both their reports

I think it's fairly obvious that he is competent to proceed at this time with whatever he'd like to.

THE COURT: I've made this entry so far, "Comes now State by assistant prosecuting attorney and defendant in person and by attorney, Fred Duchardt.

Cause taken up and evidence heard regarding defendant's competency to proceed. The Court finds defendant competent to proceed."

Anything further?

MR. CHANCELLOR: No. your honor.

THE COURT: I'll make that same entry in all three cases.

DEFENDANT'S PRO SE MOTION

MR. DUCHARDT: With regard to others matters, your Honor, Mr. Wilkins wishes for me to withdraw as counsel for him and wishes to proceed pro se.

DEFENDANT: That is correct.

MR. DUCHARDT: Judge, I've informed Mr. Wilkins, as has become obvious in the reporting to the Court, Mr. Wilkins does wish to and fully intends to seek a plea of guilty before the Court to a maximum sentence.

And the situation that I've described to him is one that we are not in a position to be able to assist him in that regard.

And his desire is to not have us do anything which a normal lawyer like position would take in attempting to provide the best possible defense for him.

So, he informed me a couple of months ago that what he wished us to do is to take the position we are now, which is asking the court for leave to withdraw and he wishes to proceed in his own behalf.

I believe he wishes to execute the standard waiver of counsel and proceed pro se.

THE COURT: If I've got this correctly, "Defendant states he no longer wants the public defender office to represent him and that he wants to proceed pro se," that is without an attorney.

DEFENDANT: Yes.

THE COURT: Everyone has a right to represent themselves. Do you understand the constitution also gives you a right to have an attorney?

DEFENDANT: Yes, I do.

THE COURT: And the Court has supplied that for you by appointing the public defender office in this case.

DEFENDANT: That is correct.

THE COURT: And there are many, of course, you are not skilled in the law. And what is your age?

DEFENDANT: Seventeen, your Honor.

THE COURT: And the extent of your education?

DEFENDANT: Ninth grade, your Honor.

THE COURT: So, you are really not familiar at all with legal proceedings, are you?

DEFENDANT: That is correct.

THE COURT: During the course of making decisions you would not have the background of legal knowledge or experience that a lawyer would possess, isn't that correct?

DEFENDANT: Yes, your Honor. I'm not, I don't, okay, that is correct.

THE COURT: All right.

MR. DUCHARDT: Judge, I might just note for the record; my understanding of what Mr. Wilkins wants to do, though, doesn't require, I don't believe in my humble opinion-----

DEFENDANT: That's right.

MR. DUCHARDT: ---What the, what a lawyer would be able to provide for him. A lawyer normally is there to make certain that the system doesn't, for lack of a better term, bulldoze over a person. And I think using that same analogy, that's exactly what Mr. Wilkins wants to happen.

And I'm, and that's basically what my discussions with Mr. Wilkins have been is concerning the things that a lawyer could help him do. And to the extent that he

wishes to do what he proposes to do, a lawyer in a lot of ways is just going to get in his way.

THE COURT: Well, I think I understand what Mr. Wilkins is asking. But, on the other hand, there might be some things that come up from time to time that, where a lawyer could provide some information and expertise so that he might better make a decision, you see.

And that was what I was getting at in part, that if he, you know, the course he wishes to pursue, I suppose as long as this Court finds that he is competent and able to conduct himself in a competent manner then he will, I guess, be permitted to pursue that avenue that he chooses.

But, on the other hand, at his age and with his lack of legal training and schooling and considering the seriousness of the offense, this Court feels that the availability of legal counsel is essential so that he can rely upon it, at least if he wants to, you see?

MR. DUCHARDT: Judge, the difficulty that I envision, I don't think that that is what he wants, but----

THE COURT: Oh, no.

MR. DUCHARDT: ----He can certainly speak for himself in that regard. The difficulty that I envision is that, is that to the extent that counsel is going to be involved in this case, that counsel, I think by the rules of ethics and the canons of ethics, the rules that go along with those, the ethical responsibility that counsel would have would get in the way of effectively utilizing the system due to what Mr. Wilkins wishes to do.

I can think of a lot of things I'd recommend for Mr. Wilkins to do that, to make it easier for him to get the death penalty, none of those would be anything that would have to do with anything that would be considered good, solid legal thinking. Actually it would all be just the opposite.

It would be recommending to him to do things which I've seen, unfortunately, in my years as an attorney which have had normally the opposite effect of the one that most people would want.

And I don't feel that my oath that I took as an attorney allows me to do that or, in fact, allows any attorney to do that.

And that's the difficulty I would see coming up for anyone to represent Mr. Wilkins after a fashion which he would desire.

DEFENDANT: Excuse me, your Honor, what I was wondering, for the route I want to take what purpose would an attorney serve, I mean for my benefit.

I can understand the purpose of the prosecutor, sir, but not --.

THE COURT: Well, I'm not sure that I'm in a position to explain that to you.

MR. DUCHARDT: I just might for the record tell the Court so that it is part of the record, Mr. Wilkins and I have talked about that---

DEFENDANT: Yes.

MR. DUCHARDT: ----particular thing.

DEFENDANT: How could it serve going the route that I'm going at the moment?

MR. DUCHARDT: And, basically what I told you is I don't see how I could help you and could only hurt you, at least to the end that you're wishing to proceed.

DEFENDANT: That is correct.

MR. DUCHARDT: And I just want to make clear for the record, that's what I advised Mr. Wilkins. And that's certainly a fair statement of the way that I put it to him, that, and, again, I can think of a lot of situations where a lawyer would help a person and where legal guidance is absolutely necessary to the extent that the person is fighting the State in attempting to impose a maximum penalty.

But, to the extent that the State wishes to pursue the maximum penalty and to the extent that the defendant wishes to agree with that, I think the attorney honestly becomes a liability as opposed to any help.

And I can't, I can't envision a situation other than to help the, help the defendant appear to be all of those things which a fact finder would consider to be the type of person who should receive the maximum sentence, which, again, is working to the antithesis of what a lawyer is supposed to be.

DEFENDANT: For defense, yes.

MR. DUCHARDT: A defendant lawyer, yes, you're right.

DEFENDANT: Yes.

THE COURT: Getting back to what I was saying before, you do understand, Mr. Wilkins, that you have a right to hire your own attorney?

DEFENDANT: Yes, your Honor, I do.

THE COURT: And that would be an attorney of your own choice and selection.

And, again, since you have been unable to employ one the Court has appointed one for you. I presume that you are still in a position not to employ your own attorney, is that correct?

DEFENDANT: That is correct.

THE COURT: But, you do understand that an attorney, of course you also understand that you're entitled to have a trial by jury in this case?

DEFENDANT: Yes, your Honor.

THE COURT: And we were about at this time to set your matter down for trial by jury in this Court. Do you understand that?

DEFENDANT: Excuse me, I'm sorry?

THE COURT: I was about to set your matter down for trial by jury with this Court.

DEFENDANT: You were or you are?

THE COURT: I said I was about to before we got into this discussion.

DEFENDANT: Okay.

THE COURT: Now, you understand that if you have a trial by jury that you'd be entitled to a lot of rights, among those would be that you would have the right to counsel to assist and aid you throughout the entire proceeding.

You'd be presumed innocent throughout the entire proceedings. The burden of proving your guilt beyond a reasonable doubt would rest with the State.

You'd have the right to confront and cross-examine all witnesses that appear against you and to call witnesses in your own behalf by compulsory process. And when I say compulsory process I mean by subpoena. You could make people come in and testify whether they wanted to or not.

You'd have the right to remain silent. You wouldn't have to incriminate yourself. And you always have, always have the right of appeal.

Now, do you understand all of those rights in the event you would have a trial by jury?

DEFENDANT: I do, your Honor.

THE COURT: And, of course, everyone has a right to have that. But, you also have the right to waive that if you wish. And you also have the right to enter a plea of guilty as your attorney has probably indicated to you.

But, you do understand that before you start making these decisions the Court feels that it would be in your best interests to have with you at all times the availability of legal counsel who is more skilled and more knowledgeable in the situation than you are, and I'm talking about your pretrial matters regardless of your decision that you finally decide that you must make.

You may not know, there are several things that you may not know how to do, the things that you want to do to get them done as expeditiously and as quickly as you desire, you see?

DEFENDANT: That's a possibility, your Honor.

THE COURT: You see, it might be that if you had the availability of a lawyer to discuss, that is to discuss these problems with him in connection with the law governing the matter, that you might make a different decision than you otherwise would.

DEFENDANT: If I would be able to get a lawyer that would help me proceed along the lines that I want to proceed, I'd be more than happy to have a lawyer that would help me gain the goal I'd like to reach.

THE COURT: Well---

MR. DUCHARDT: Heath, you should probably put it in simple terms what you want the lawyer to do because---

DEFENDANT: Well, if the lawyer could help me get the death penalty, you know, if he's got, I don't know if it's ethical, but moral standards that would keep him from working to his best ability to do that, you

know, or whatever else, or ever other word that he's telling me when he's giving me advice he reminds me that he thinks it's wrong. And that's not what I'm asking for.

MR. DUCHARDT: And that's basically what I'm doing, right?

DEFENDANT: Yes.

THE COURT: Well, you understand any lawyer would be honor bound and ethically bound to give you the advice that he thinks is in your best interest.

DEFENDANT: That is correct.

THE COURT: But, at least you do understand that there's a possibility that you might, there's always the possibility that you could enjoy some success in the trial in your case. You might win your case, you might go free, do you understand that?

DEFENDANT: Yes, I understand that.

THE COURT: And, of course, you certainly would have a better chance to, of having that accomplished with the lawyer than without one, do you understand that?

DEFENDANT: Yes.

THE COURT: Because you certainly don't have, you wouldn't know how to conduct your own defense. You wouldn't know how to conduct the voir dire examination of the jury. You wouldn't know how to

examine witnesses. You probably wouldn't even know how to select the jurors as well as a lawyer would.

You wouldn't certainly know how to make objections and do all of these other things to protect the record. In the event you were found guilty you probably would not know the necessary process to take for appeal or the proper motions to file, the different actions to proceed.

And, of course, on appeal you wouldn't again have the experience and expertise to properly present that to a court of appeals or to the supreme court or any other court for that matter, isn't that all true?

DEFENDANT: To an extent, yes.

MR. DUCHARDT: Heath----

THE COURT: Have you taken all of these considerations----

DEFENDANT: Yes, your Honor, I have.

THE COURT: You've considered all of those things in making----

DEFENDANT: Yes.

THE COURT: ---the decision that you have made?

DEFENDANT: Uh huh.

MR. DUCHARDT: May I interject one thing, your Honor?

THE COURT: Yes, sir.

MR. DUCHARDT: Heath, have I explained to you basically the types of things that I would do if I were your attorney in attempting to try this case to attempt to reach the type of result that Judge McFarland was talking about earlier, in other words trying the case in an attempt to win it, for lack of a better term. Did I explain all of that to you?

DEFENDANT: Yes.

MR. DUCHARDT: And is it a fair statement that you said that's just not what you want a lawyer to do for you?

DEFENDANT: Yes, that's unacceptable, yes.

THE COURT: How long have you thought about this decision to discharge Mr. Duchardt as your attorney and to conduct your own defense?

DEFENDANT: Since----

MR. DUCHARDT: January.

DEFENDANT: ----January. And the last, my original court hearing when my evaluation from Tri-County when I came in here, I was ----

MR. DUCHARDT: Western Missouri.

DEFENDANT: ----Yes, Western Missouri, I mean.

THE COURT: I must be rather candid with you, you understand that if you, if you do, as I understand what you've indicated here that you want to do, you might very well enter a plea of guilty and ask for the death penalty.

Now, do you understand fully that if you do that, that decision then would be up to the Court as to whether or not you'd receive the death penalty or not?

DEFENDANT: Yes.

THE COURT: And the Court is the judge, do you understand that?

DEFENDANT: Yes.

THE COURT: And you understand further that the Court would not have to accept your recommendation as to the penalty?

DEFEDANT: Yes, you wouldn't have to.

THE COURT: Do you understand that?

DEFENDANT: Uh huh.

THE COURT: And you understand that you might better, you might very well have a better chance of receiving whatever you want to receive in front of a jury. Have you ever thought about that?

DEFENDANT: Yes. Yeah, but, I've touched that but I came at it a different way.

THE COURT: Well, I just want, you have considered all of that?

DEFENDANT: That is correct, your Honor.

THE COURT: Mr. Duchardt, have you talked with Mr. Wilkins at length about this situation?

DEFENDANT: Yes, sir.

MR. DUCHARDT: How many times would you say, Heath, that you and I have talked about this, three or four times anyway over at the jail.

And a couple of those conversations were at least two hours long, I think.

Judge, I've tried to describe for Mr. Wilkins all of the different possibilities and all of the options that ----

DEFENDANT: Yes, sir, quite explicit.

MR. DUCHARDT: ----are, his words are well taken, quite explicit. And I've attempted to go through every potential option that I can see in our ability to defend this case and attempt to present a valid defense on his behalf.

And also I've attempted to describe for him the scenario should he wish to go ahead and proceed as he is. And that's what got us to our specific conversations about the fact that, at least in my opinion, a lawyer would be duty bound to do things just the opposite of what Mr. Wilkins would wish be done should he continue on this path of trying to seek the maximum punishment for himself.

DEFENDANT: Yeah, I'd like to make your Honor aware that this isn't, you know just a spur of the moment idea or anything along that line.

I've, the Court would've been aware at a more earlier date but my attorney proceeded without my former knowledge in my, along my case and without consulting with me.

MR. DUCHARDT: The, along the lines of what Heath is talking about, Judge, when we originally undertook Mr. Wilkins' representation I presumed as an advocate that all necessary things should be done to properly prepare this matter for an eventual trial on the merits of the case.

And I, without receiving specific instructions from him to do so, filed an application for mental examination and also filed an application for change of venue, the first of which we've completed today and the other one still has not been heard because we had to determine competency.

I did not seek Mr. Wilkins' counsel about those and he informed me a couple of months after I had gotten the procedure in process basically what he's telling the Court today, that despite my understanding to the contrary, actually assumptions in some way to the contrary, that he wished to do what he's in the process of doing right now.

DEFENDANT: And I, you know, I do understand that these tests that were taken were quite necessary. But, the fact remains that I would've proceeded without any knowledge at all.

THE COURT: Well, you understand, Mr. Wilkins, that we're talking about serious matters here. We're talking about matters that have some finality to them. And the proceedings proceed to a point where at some point you can't, you can no longer change your mind, you see?

DEFENDANT: Yes, your Honor, I understand.

THE COURT: And you are a young man. You have a lot of years ahead of you. And I will not at this time accept your request that you represent yourself.

I don't think I will anyway. I want you to think about it at least another few days, maybe a week at least, even though you say you've been thinking about it since January, is that correct?

DEFENDANT: I can accept that.

MR. HARMAN: Your Honor, the State's position would be consistent with the court's, that an attorney could provide counsel, advice, and assistance in some form to this defendant if necessary.

MR. DUCHARDT: I've heard that twice and I really, with all due respect to Mr. Harman and to the Court, I'd really like to know what in light of what Mr. Wilkins wishes to do.

I have thought about this for the last three months. And I am totally at a loss to understand how a lawyer acting within the bounds of propriety, conscience, and particularly the rule, canons and rules of ethics, could do anything to help this man get the death penalty.

I'm really at a loss to know what it is that a lawyer can do in good conscience.

THE COURT: And I would not direct you to assist him to get he death penalty.

MR. HARMAN: And it is not the State's desire, Mr. Duchardt.

THE COURT: But, I might very well, and I will say this, if I sustain his application to represent himself I will still order that the public defender office be appointed for him.

And the public defender office will be directed to remain available for consultation with him throughout the entire proceeding.

DEFENDANT: That is if I would request it.

THE COURT: Whether you request it or not.

DEFENDANT: Okay.

MR. DUCHARDT: My only, of course, I'll follow any order as to my presence in the courtroom. I, again, am at a loss to know how I can advise a person to, to help with a particular matter. But, I guess we can take that up on a case by case basis on the questions that were posed to me by Mr. Wilkins.

The only problem that we would confront there would be problems of privilege. And, but, the difficulty that I envision with that type of scenario is that the types of questions that would come up, I would think,

would be questions along the lines of how he could, how Mr. Wilkins could best achieve his goal.

And I don't think I'm ethically in a position, and certainly morally I'm not in a position to be able to assist him with that.

MR. HARMAN: Your Honor, it's not the State's position to ask Mr. Duchardt or his office or any attorney to do anything unethical or immoral.

We simply believe with the Court that there may be some matters where assistance or advice or counsel may be necessary.

And, again, Mr. Wilkins may have questions unrelated to the ultimate question which Mr. Duchardt presents to the Court.

And for that reason the State believes counsel should be made available to this defendant at any time during these proceedings.

That's really all we want to make clear to the Court.

THE COURT: Well, and I hope that I made clear that in the event I accept the defendant's application to represent himself, and with his constitutional right to do so it may be that I will have to accept that, even though I don't like to do it.

If I do that I will appoint or ask or order that the public defender office remain available for consultation throughout the proceedings, whatever they might be, in this Court.

MR. HARMAN: And I would note that has been done in the past, your Honor.

THE COURT: It has been done in the past.

MR. HARMAN: In State versus Rollie, I believe, a similar situation.

THE COURT: Right, Henry Rollie, that's correct.

MR. DUCHARDT: Judge, the difference in Mr. Rollie's situation was that Mr. Rollie was attempting to be found not guilty, which I think is a very significant difference to this one.

Again, the problem that I have, despite the fact that everybody feels, and I respect the tremendous amount of wisdom in the Court and also in the prosecutor's office, but I literally have racked my brain and have tried to figure out what I could do, what type of advice that Mr. Wilkins would be seeking that would not be related to his ultimate goal.

I think the problem that you have is that all decisions on strategy and everything else in a trial, all are based in some measure toward the ultimate goal of the, of the trier.

And to the extent that Mr. Wilkins' ultimate goal is to receive the maximum punishment and be found guilty, any help that I, any steps that I would take to assist him in that regard I just don't think are proper for me to take.

But, again, I'll respect any order that the Court gives me. And to the extent that I'm placed in that position I'll put it on the record.

I guess that's the best that I can do under the circumstances. And I'm, as I said, I'll follow any order the Court gives me.

THE COURT: Well, you really probably shouldn't presume that everything he has done in the past will be continued in the future with consistency. If may very well be, but you shouldn't-----

MR. DUCHARDT: And I don't----

THE COURT: -----I don't think you can presume that. And I don't think we should really argue out that particular problem here today because regardless of your feelings the Court will do as I've just said. And you'll have to do your job as best as you can and with your ethical feelings and moral feelings about the matter have to do, as I know you will the good lawyer that you are, and accept the responsibility that will be placed upon you by this Court.

I understand that it's not one that you favor. But, still, I want you to know, that is what, and I'm telling the defendant, that is what will happen.

Do you understand that?

DEFENDANT: Yes, I do.

THE COURT: Do you have any questions about it?

DEFENDANT: No, your Honor.

MR. DUCHARDT: Judge, I would just, as an additional thing, note for the Court that Mr. Wilkins has ordered me not to proceed any further with an investigation of the facts of the case, Am I saying it right?

DEFENDANT: That's correct, or proceed on a one-on-one basis. I request that you do not.

MR. DUCHARDT: You need to explain to them. I think I understand what you mean. What do you mean by one-on-one basis?

DEFENDANT: That if I understand the Judge's order for you to be available in case there are questions that arise that I would have so that you could answer them.

And what I was ordering you, as stated, that I did not want any further investigation on my background or any further investigation on, I should say any further investigation that could at all make this case proceed in the direction that I do not want it to go.

MR. DUCHARDT: In other words you did, I think you said specifically you don't want me to go out and interview witnesses?

DEFENDANT: No way.

MR. DUCHARDT: You don't want me to do any of the things like I described I was going to do?

DEFENDANT: No.

MR. DUCHARDT: Normal investigation of the case, normal filing of motions. I think you indicated to me that you wanted me to withdraw the motion that I filed for change of venue.

Again, I just wanted to make sure that everybody knew that despite the fact that I guess I'm going to be the lawyer in name, Mr. Wilkins has ordered me not to do anything.

THE COURT: But, your lawyer has indicated to you that you do have a right to ask for change of venue, and you know that?

DEFENDANT: That is correct.

THE COURT: Or you could ask, you have a right to ask for change of judge if you want to do that, and you understand that?

DEFENDANT: That is correct.

MR. DUCHARDT: I think he's, we're not timely on that, Judge.

THE COURT: Well, you have a right to ask for it, at any rate.

MR. DUCHARDT: I don't think it's his intention to do it, but --.

THE COURT: Well, I think that I will reset this matter for another date and at that time make the determination as to whether or not the Court will allow this defendant to represent himself with the proviso that I made, with the proviso that I just mentioned, that is

that you would remain available for consultation throughout the entire proceedings.

MR. DUCHARDT: Judge, I guess I just have one question of the Court; my normal procedure, as the Court, I think, is familiar enough with me to know, is to make sure that I've talked to every witness and know completely what all of the witnesses are going to say and do before ever coming to trial.

However, as the Court sees, I'm not in a position to do that if I am going to follow the instructions of my client.

I would just ask the Court if the Court is ordering me to do what I would normally do or to follow the advice of my client or if I should make that decision myself?

THE COURT: Mr. Duchardt, at this point you have not been relieved of your responsibilities as his lawyer, period.

MR. DUCHARDT: All right, sir.

THE COURT: Beyond that I can't say any more.

Now, I'm going to set this for next Wednesday, April 23rd, at 11 o'clock in the morning for the determination of this issue.

MR. DUCHARDT: Judge, then in light of the Court's statement in that regard I need to tell Mr. Wilkins that I'm going to go ahead and proceed with the investigation concerning the case since I think that's my ethical duty to do that.

THE COURT: That's up to you.

On April 23rd at 11 o'clock we'll address this issue again. And at that time the Court will make an entry.

DEFENDANT: Would, since you're going to proceed with the investigation, I'd like to ask you if you could, I'd appreciate it if you would make me aware before you proceed exactly what you're doing, you know.

MR. DUCHARDT: I'll be talking to all of the witnesses that the State has endorsed.

DEFENDANT: Okay.

THE COURT: "Cause continued to April 23rd, 1986, at 11 o'clock a.m."

* * * * * * * * * * *

These proceedings came on before the Honorable Glennon E. McFarland, Judge of Division One of the Seventh Judicial Circuit of Missouri, at Liberty, on Tuesday, the 23rd day of April, 1986.

The defendant appeared in person throughout these entire proceedings.

The appearances were as hereinbefore set forth.

The following proceedings were had:

THE COURT: All right, the next matter I see on the docket is State versus Wilkins, CR185-490, 491,

and 492, State versus Heath Wilkins also known as Pyzon. Come up, please.

Are you Heath Wilkins?

DEFENDANT: Yes.

THE COURT: Mr. Wilkins, my record shows on April 16th you appeared before this court. At that time the Court found you competent to proceed.

And the Court was informed at that time that you no longer wanted the public defender office to represent you and that you wanted to proceed pro se.

DEFENDANT: Yes, sir, that's correct.

THE COURT: And at that time I explained to you certain reasons why I thought it would be in your best interest that you have the public defender remain on as your attorney.

DEFENDANT: (Nods his head.)

THE COURT: And how it would benefit you to have them and how you might be aggrieved by not having them.

And among those was the fact, as I understand it, that you are seventeen years of age, is that correct?

DEFENDANT: That is correct, your Honor.

THE COURT: And that you have no legal training or experience?

DEFENDANT: That's correct, your Honor.

THE COURT: You're charged with murder in the first degree, you do understand that?

DEFENDANT: Yes, your Honor.

THE COURT: And you understand the range of punishment for that is a possible death penalty?

DEFENDANT: Yes, your Honor.

THE COURT: Or life imprisonment with no probation or parole or release except by act of the governor?

DEFENDANT: I'm quite aware of that, your Honor.

THE COURT: And you understand that. And, of course, you understand that if you were dissatisfied with the particular attorney who represented you that you'd have the right to hire your own attorney?

DEFENDANT: Yes.

THE COURT: And you have been found indigent and the public defender office has been appointed for you in this case.

DEFENDANT: (Nod his head.)

THE COURT: I want you to know that Mr. Duchardt has demonstrated that he is a competent and skilled criminal defense lawyer. And he is willing to aid

and assist you throughout these proceedings. You do understand that?

DEFENDANT: Yes, your Honor.

THE COURT: Do you further understand that this will be bifurcated type of a proceeding, that is it will be separated so that the first segment is the finding of guilt or innocence. And if you are found to be guilty then the second stage becomes the state where the determination of punishment if made. Do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: And you are entitled to have an attorney at both of those stages, you do understand that?

DEFENDANT: Yes.

THE COURT: And if you decided that you didn't want one at one stage and wanted it at the other, you could also have that, do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: Were these things previously indicated to you either by Mr. Duchardt or by anyone else, these things that I've been telling you?

DEFENDANT: Partly, your Honor.

THE COURT: And, of course, the attorney could aid and assist you, as I mentioned at the last court proceeding, throughout the entire proceeding; that is in

the preparation and investigation of your case, the advising you of your rights, the examination of the prosecuting attorney's file, the various means of obtaining discovery and information about the case.

DEFENDANT: Yes, he did, your Honor, if that was necessary.

THE COURT: And legal research. And they could help you, of course, in the conduct of your trial and at all other pretrial proceedings.

And in regard to the conduct of the trial if you had one, of course, they could obviously do a better job than you in conducting the voir dire examination of the jury panel, in selecting the jury, in making opening statement, in examining and cross-examining all witnesses, in making objections and preserving the record for appeal, making all proper motions, in the preparation for instructions that are submitted to the Court for submission to the jury, all arguments to the jury and to the Court.

And in the event you are found guilty they would assist you in your right of appeal. And the first step of that would be, probably, a motion for new trial.

Now, you don't have any legal experience. You don't have any legal training. And the Court encourages you to change your mind and to accept the representation, that is the continued representation of the public defender office. And you do understand all of that?

DEFENDANT: I understand, your Honor.

THE COURT: And, as I understand from what you told me the last time you were here, that you had talked about this with the public defender for some time, I thought you said clear back as far as January of 1986?

DEFENDANT: That is correct.

THE COURT: And you have been contemplating this move of asking to proceed pro se from that time until today, is that correct?

DEFENDANT: Yes, your Honor, that's when I made the decision to proceed pro se and I still stand by it.

THE COURT: When did you make your decision to proceed pro se?

DEFENDANT: I don't know the exact date, but----

MR. DUCHARDT: February, wasn't it?

DEFENDANT: I think somewhere around February. After the court at the end of January is when I come up with the decision to proceed pro se.

THE COURT: And you have had an opportunity, then, to discuss this fully with Mr. Duchardt or other members of his staff?

DEFENDANT: Oh, yes.

MR. DUCHARDT: Mr. Wilkins, I'm sorry, I didn't mean to interrupt.

THE COURT: Have you had an opportunity to discuss that same decision with everyone else that you might want to talk to about it?

DEFENDANT: There's nobody else, nobody else who has any hand in my decision, your Honor.

THE COURT: Do you have any questions that you want to submit to the Court about the situation?

DEFENDANT: Well, you know, before you make your decision I was, you know, I was declared competent to proceed. And with my decision, it is a competent decision.

THE COURT: That's correct.

DEFENDANT: And I'd just like that to be clear.

THE COURT: Yes, that is true.

DEFENDANT: And that's all.

THE COURT: Now, knowing all of the things that I have just mentioned to you and what I mentioned to you the last time you were before this Court, what is your desire now?

DEFENDANT: To proceed pro se, your Honor.

THE COURT: You want the public defender office to be, well, to not further represent you in this case?

DEFENDANT: That is correct.

THE COURT: Well now, you, I want to tell you something, have you looked over the form, by the way, that was given to you, the written form that you would have to sign in the event you decided to represent yourself? Did I give you a copy of a form?

DEFENDANT: I don't believe you did, your Honor.

THE COURT: I thought I did.

MR. DUCHARDT: I don't believe so.

THE COURT: Well, at some stage you would have to sign a written waiver of counsel. And among the things that would be covered in that written waiver would be the fact that you're charged with the offense of murder in thef first degree and that you have a right to a trial on that charge.

And, further, that you have a right to trial by jury. And that the maximum possible sentence on the charge is death. And that the other possibility of, that the other possibility of, that the other possibility for punishment would be life imprisonment with no probation or parole or release except by act of the governor.

The form would also recite that you are aware that any recommendations by a prosecuting attorney or other prosecuting official are not binding on the Court or on the judge and that any such recommendations may or may not be accepted by the judge.

The form would also tell you that if you plead guilty or if you are found guilty of the charge that the judge is most likely to impose a sentence of death.

Now, the statute also prescribes a sentence of confinement, but the statute does not contemplate a situation like this where a person faces the death penalty.

And, therefore, you must know that that would be in the form as well.

DEFENDANT: (Nods his head.)

THE COURT: Also that if you're indigent and unable to employ an attorney that you have a right to request the judge to appoint counsel to assist you in your defense against the charge.

Now then, you must further know that if you are permitted to file a waiver and you do waive your right to have an attorney and if the Court permits that and a plea of guilty or a finding of guilty on the charge is entered, before the imposition of sentence of confinement the judge shall determine, first of all, that if a plea of guilty has been entered that there is a factual basis for the plea and that you, in fact, are guilty of the charge.

Also I would also be required to inquire into whether or not you know of the existence of any witness or of any facts, circumstance, or evidence which was not presented to the Court which would exonerate your of the charge.

DEFENDANT: I can accept that.

THE COURT: And I'm also required to inquire of the prosecuting attorney as to whether or not there are

any witnesses or evidence which would cast a reasonable doubt about your guilt or defenses available to you not disclosed to the Court.

Do you understand all of those things?

DEFENDANT: Yes, I do, your Honor.

THE COURT: And, again, you understand that this Court strongly encourages you to retain counsel and have counsel throughout the entire proceedings:

DEFENDANT: Yes.

THE COURT: Now then, with all of that are you saying, what do you wish to do, again?

DEFENDANT: To proceed pro se, your Honor.

THE COURT: Anything further?

MR. DUCHARDT: Your Honor, may I just for a moment --

THE COURT: You may.

MR. DUCHARDT: Mr. Wilkins, I think we've covered this before for the record, but just let me make sure that the record is clear; you and I have talked on numerous occasions about your desires to plead guilty and seek the death penalty, is that correct, sir?

DEFENDANT: That is correct.

MR. DUCHARDT: And that is your desire, is that correct, sir?

DEFENDANT: That is correct.

MR. DUCHARDT: And then I informed you, is this a fair statement, that in my position as legal counsel that I did not feel that I could offer you any assistance in doing that, that most of what the judge has described to you this morning are the types of things that a lawyer would do were that lawyer trying to obtain for you a lesser charge, a lesser sentence, or---

DEFENDANT: Yes.

MR. DUCHARDT: --- an acquittal?

DEFENDANT: Yes, I remember those from the last hearing.

MR. DUCHARDT: And those are the things that I have indicated to you that I'm ready, willing, and able to do for you, is that a fair statement?

DEFENDANT: It is.

MR. DUCHARDT: And where our problem has come is that you don't want me doing that stuff for you, is that a fair statement also?

DEFENDANT: That is a correct statement.

MR. DUCHARDT: Okay. And are you indicating to the Judge that you do not wish my office to be appointed for you or allowed to remain as legal counsel for you for legal representation?

DEFENDANT: That is what I have stated, yes.

THE COURT: Anything from the State?

MR. CHANCELLOR: No, your Honor.

MR. DUCHARDT: I would again renew my motion to withdraw, your Honor, because pursuant to the public defender statute since Mr. Wilkins has indicated that he does not wish legal representation from my office he is no longer a person who qualifies for public defender services.

And I don't think the statue allows me to continue representation of him. And, certainly, I can't think of anything, as I've noted to the Court, considering Mr. Wilkins' desires. I personally don't feel that he's competent to make those decisions. But, of course, the Court has made its decision on the basis of information which has already been presented.

But, in any event, I cannot and will not assist him in the path that he's chosen.

THE COURT: I've made this entry, but, before I do that I want you to know that the entry that I'm about to make, of course, is contingent upon you executing a valid waiver, a proper waiver of counsel. This has not been filled in as yet (indicates).

And the one that I see here is not yet in complete conformity with the statutes. I'll have to have this one redone.

So, I think I will withhold making my entry until the waiver has been properly filled in and executed by you. And that will take some time. And I anticipate that

we will not be able to get to that until about 1:30 this afternoon, at least, maybe 1:45.

So, this matter will be set over until that time. And I'll ask my reporter in the meantime to go back and prepare one that does conform with the statute.

So, that will be all at this time and the matter is continued until, I'll try to make it 1:30, but it may be as late as 1:45 this afternoon.

That'll be all.

* * * * * * * * * * *

The following proceedings came on at 1:36 p.m. on April 23rd, 1986, with all parties present as hereinbefore.

THE COURT: CR185-490, 491, and 492, State versus Heath Wilkins.

Mr. Wilkins, I'm going to hand you a waiver of counsel form that you may look over. And I think you should be provided with a pen.

You may take that back with you to the counsel table and look it over. We will handle another matter while you read that fully and decide what you want to do with it.

* * * * * * * * * * *

The following proceedings came on at 2:28 p.m. on April 23rd, 1986, with all parties present as hereinbefore.

THE COURT: Back to State versus Wilkins, three cases, CR185-490, 491, and 492.

So far all we've been talking about, I guess, what we've been talking about would pertain to all three of those cases, do you understand that?

DEFENDANT: Yes, your Honor.

(Hands item to judge.) I completed that.

THE COURT: And is that your signature (indicates)?

DEFENDANT: It is, your Honor, yes.

THE COURT: Well, you were supposed to have signed that in my presence and I didn't see you sign it. Would you sign above it again, please, if you want to?

(Defendant does so.)

THE COURT: By the way, you didn't fill in the date. And the date is the 23rd (judge hands paper to defendant who fills in date and returns it to judge.)

THE COURT: Mr. Wilkins, before you signed this did you read it through fully?

DEFENDANT: Yes, your Honor, I did.

THE COURT: Did you understand it fully?

DEFENDANT: Yes, your Honor, I did.

THE COURT: Do you have any questions about it at all?

DEFENDANT: No, your Honor.

THE COURT: This needs your signature as well (hands to deputy circuit clerk who signs it and returns it to judge.)

DEFENDANT FILES WAIVER OF COUNSEL

All right, I will show the defendant's waiver of counsel filed with the case. And this pertains to CR185-491FX, that is the Class "A" felony of murder in the first degree charge.

Mr. Prosecutor, will that be the case you will be proceeding with first?

MR. CHANCELLOR: Yes, your Honor.

THE COURT: Well, then we will just take it as to that case at this time then, I suppose.

Mr. Wilkins, did you want your waiver to apply to all three cases?

DEFENDANT: Yes, your Honor, I did, but I was, I notice that you didn't verbally apply it, you did not say it was being two or three cases so I figured that you were going to give me two more.

But, yes, I'd prefer to apply it to all three cases.

THE COURT: All right.

DEFENDANT: But, on the writing it said only the one. So, I figured you were going to give me two more.

THE COURT: Do you have some other blank forms there?

(Deputy circuit clerk hands items to judge.)

THE COURT: CR185-490 is the Class "B" felony of unlawful use of a weapon. The possible range of punishment on that charge is one day to one year in the Clay County Jail or one to five years in the Missouri Division of Corrections and/or a fine not to exceed the sum of $5,000.00.

There is another provision about it being double the amount of the offender's gain but not to exceed the sum of $20,000.00. That has another fine with it, but that wouldn't come into play in this case.

And when I say and/or a fine that means it can be a fine alone or it can be a fine plus incarceration, do you understand all of that?

DEFENDANT: Yes, your Honor.

THE COURT: 492 is the Class "A" felony of armed criminal action.

Mr. Prosecutor, is the range of punishment for that armed criminal action three years to life?

MR. CHANCELLOR: Yes, your Honor.

THE COURT: Not less than three years----

MR. CHANCELLOR: No, your Honor, not less than three years or life imprisonment.

THE COURT: And that's the entire range of punishment?

MR. CHANCELLOR: Yes, sir.

THE COURT: Here are two more forms (hands to defendant.)

DEFENDANT: Your Honor?

THE COURT: Yes.

(Defendant fills out form and signs it in Judge's presence.)

THE COURT: Would you mind dating that right at the bottom?

DEFENDANT: Here? (Indicates)

THE COURT: No, right down here (indicates). Just put the date there.

(Defendant does so.)

(Defendant fills out and signs another form in the Judge's presence.)

THE COURT: Did you read all of these other two forms?

DEFENDANT: Yes, your Honor, I did.

THE COURT: And did you understand everything that you read?

DEFENDANT: Yes, your Honor.

THE COURT: I've made this same entry thus far in all three cases; "Comes now State by assistant prosecuting attorney and defendant in person and by attorney, Fred Duchardt.

Court encourages defendant to proceed with the aid and assistance of counsel. Defendant states he wishes to proceed without a lawyer," is that right?

DEFENDANT: That is correct.

THE COURT: "Public defender office granted leave to withdraw except that Fred Duchardt is ordered to remain available for consultation throughout the proceeding." That's consultation, of course, with the defendant.

The next step, I suppose, would be for, to set the matter for a hearing or for further proceedings, at any rate.

MR. DUCHARDT: Judge, May I just make sure that I know what the Court is asking of me?

THE COURT: Yes, sir.

MR. DUCHARDT: I take it that I am not to act in Mr. Wilkins' behalf since he's asked that I not, but only be available in case he does wish to inquire of some matter concerning the law or something like that.

Am I fairly understanding the Court's order?

THE COURT: I think that's generally correct.

Do you understand it to be that way, Mr. Wilkins?

DEFENDANT: Yes, your Honor.

THE COURT: If you desire any assistance from Mr. Duchardt then you contact him, otherwise he is to remain available throughout these proceedings.

If there is a trial then he will remain with you throughout the trial in case you need any aid or information of any kind. And at any stage in the investigation or preparation if you feel that you need his assistance he is to be available when called for whatever purpose.

Unless you do call, you understand, he will not be volunteering his services?

DEFENDANT: Yes, your Honor, I do.

MR. DUCHARDT: And I just need to make sure that the record reflects, and I've told Mr. Wilkins this before and I think I've made it clear for the record, but, just to make certain; I will not lend him any information which in my opinion might aid him in seeking the death penalty because I don't think that that would be good counsel of law. I'm just not in a position to be able to do that.

THE COURT: Very well.

Do you understand that as well, Mr. Wilkins?

DEFENDANT: Yes, I understand his statement.

THE COURT: Do you have any objections to any of that?

DEFENDANT: No, your Honor.

THE COURT: I suppose the next thing would be to set the matter down for further proceedings at another time.

Mr. Wilkins, what is it that you wish to do now?

DEFENDANT: Well, your Honor, I'm pro se, you know, with my attorney. Without my attorney I'd like to seek to plead guilty to all three charges.

THE COURT: Well, I want you to, first of all, understand that you enter a plea of guilty. You understand that you've been charged with these three offenses, one of which is the offense of murder in the first degree?

DEFENDANT: Yes.

THE COURT: And we've gone through this before, but you do have a right to trial on the charge and you have a right to trial by jury. You do understand that?

DEFENDANT: Yes, your Honor.

THE COURT: And if you have a trial by jury you understand that it would take twelve jurors all together agreeing before they could recommend a verdict finding you guilty.

And also in the punishment stage, that second stage, it would also take twelve jurors agreeing again to assess a penalty, which would either be the death penalty or life imprisonment with no probation, parole, or release except by act of the Governor.

But, whatever it would be it would take all twelve jurors agreeing.

Now, if they couldn't agree, of course, then that might result in a mistrial, you see, or a hung jury we call it.

And then it would have to be done over again if the State wanted to proceed again.

Now, you understand that if you have a trial by jury or, and there's always the chance that the jury could find you not guilty or they could find you guilty or they can not agree, they can get hung up as we call it. Do you understand all of that?

DEFENDANT: Yes, your Honor.

THE COURT: And, of course, if you enter a plea of guilty here to this, to these charges, then you will not get the benefit of having the chance of going free, do you understand that?

DEFENDANT: Yes, your Honor, that is correct.

THE COURT: And if you do decide to enter a plea of guilty and if the Court does accept your plea of guilty to these charges, then thereafter the Court will not permit you to withdraw that plea?

DEFENDANT: That is correct.

THE COURT: However, when we're talking about the first degree murder case, that is a two stage trial, we call is a bifurcated trial.

And even if you persist with your indication that you wish to enter a plea of guilty, it will still be in two stages. The first stage would be for the Court asking the plea and accepting it or not accepting it.

If the Court did accept it then we would go to the second stage.

Now, of course, you have a right to trial by jury in both of these stages, you see. But, even if you decided, even if you decided to plead guilty and the Court accepted your plea, if you changed your mind then and decided that you wanted to have a trial by jury, you could have that, do you understand that? And the Court would provide that for you.

DEFENDANT: Yes, your Honor.

THE COURT: Also if you decided at any time during any of these proceedings that you would desire to have an attorney represent you, you just make that known to the Court and the Court will see that an attorney is appointed or that Mr. Duchardt would then be reappointed, I guess, to act fully as your counsel and not just an advisor, do you understand that?

DEFENDANT: Okay.

THE COURT: I might say that I agree with Mr. Duchardt, I think that it is not a good move on your part to plead guilty and ask for the death penalty.

And I say that because undoubtedly in this type of a proceeding the State will also be asking, I presume, for the death penalty.

And in that kind of a situation the Court will quite likely enter a death penalty punishment in this case. And, you see, this isn't a game we're playing, this a very final situation. And that's why I'm saying all of this to you so that, we're going to set this matter down for a plea if you say you want to do that sometime in the near future.

But, between now and then I want you to think about it because when it gets to the stage that I have accepted your plea of guilty, then the action is then irreversible, you see. You can't change your mind.

And, you know, it might sound like to you that entering a plea of guilty and asking for the death penalty is the thing to do for whatever reason you think. But, on the other hand, you can't change your mind after that. We're not playing games, this a serious thing and receiving the death penalty is not a pleasant experience. That's a terrible experience.

And if you think you're escaping something by asking for the death penalty, you probably are not.

DEFENDANT: I appreciate----

THE COURT: I mean you'll be put there on death row----

DEFENDANT: -----your advice.

THE COURT: -----and you'd have to wait for that, you see. And when the final time comes and if death would be imposed upon you as it is now by statute, it would be by lethal gas.

And they would drop this pill in the acid and then the gas would engulf you and it's a terrible thing. You'd choke and you'd, it would burn your nostrils and burn all the way down. That's a terrible thing. And it wouldn't be an easy death, it would be terrible.

And what I'm saying to you is that you may have some misconceptions that taking the death penalty is the easy way out.

And I strongly suggest to you that you change your mind on this. You've given this a lot of thought. And that you do not ask for the death penalty and that you back all of the way up, that you ask for a lawyer, that you ask for trial by jury and let the due process of law take its course.

Now, do you understand all of that?

DEFENDANT: Yes, your Honor, I understand what you're doing.

THE COURT: Okay. Now, I won't ask you, well, first of all, have you decided what you want to do so far, I mean thus far?

DEFENDANT: Yes, your Honor.

THE COURT: And what is it that you want to do?

DEFENDANT: I want to plead guilty to all three charges.

THE COURT: I would appear that I could take this matter for a guilty plea on Friday, May 9th.

Would you be available at that time, Mr. Duchardt?

MR. DUCHARDT: Yes, sir.

THE COURT: And you, Mr. Prosecutor?

MR. CHANCELLOR: Yes, your Honor.

THE COURT: I have some other matters set at 9 o'clock. I think I will set this for 10:30 in the morning.

Is that agreeable with you, Mr. Wilkins?

DEFENDANT: Yes, your Honor, it is.

THE COURT: You know, I might also suggest to you that you talk to whoever, any family members, friends, or other people that might help you. It might help you to talk to other people about this decision you're having to make, people that care about you and that you have confidence in.

And I want you to use this period of time between today and May 9th to think about this fully. Just because you tell me here today that you want to enter a plea of guilty doesn't mean that you can't change your mind now.

And you can change your mind at any time up to and until the Court accepts your plea.

I've made this further entry; "Cause continued to May 9th, 1986 at 10:30 a.m." I'll make the same entry in all three cases.

* * * * * * * * * * *

The following proceedings were had before the Honorable Glennon E. McFarland, Judge of Division One of the Seventh Judicial Circuit of Missouri, at Liberty, on Tuesday, April 29th, 1986.

The defendant was present in person throughout these entire proceedings.

Mr. Duchardt was present in the courtroom and Mr. Larry Harman represented the State.

THE COURT: CR185-490, 491, and 492, State versus Heath Wilkins.

Mr. Wilkins, I had you brought up today, and I note that Mr. Duchardt is sitting in the courtroom, so I could deliver to you some petitions to enter plea of guilty if you still persist with your request to enter pleas of guilty.

We must have one of these filled out for each case.

I forget, did you tell me that you can or cannot read?

DEFENDANT: I could, your Honor.

THE COURT: You can read?

DEFENDANT: Yes, sir.

THE COURT: All right, I'm giving these to you so that you can have plenty of time to read and study these over. These contain many of the rights that you're entitled to if you have a trial by jury and some of the things that you waive if you do not have a trial by jury.

I'm going to give you three copies of this (hands to defendant.) And you should fill one out for each case in which you intend to enter a plea of guilty.

In addition to that, in regard to case number CR185-491 there is another form. And this pertains only to that one case of murder in the first degree. And it is a written waiver of trial by jury that the Court would also require you to sign in addition to the others if, again, you want to waive trial by jury and enter a plea of guilty. (Hands items to defendant.)

MR. HARMAN: Your Honor, excuse me, does that waiver include any language as to the possible right of trial for both stages of the proceedings?

THE COURT: Yes, it does, that's the reason I prepared it----

MR. HARMAN: All right, sir.

THE COURT: ----that second waiver. It is specifically for that purpose.

MR. HARMAN: Yes.

THE COURT: And you do understand that as to CR185-491FX, that is the murder in the first degree charge, as to that case the trial is a bifurcated, it's a two stage trial.

We refer to the first stage as being the guilt or innocence stage and the second as being the punishment stage.

The guilt state, if you have a trial, of course, by jury it would be that trial. And if not it could be by your plea of guilty. And then the second stage, of course, comes later.

But, in regard to both of those stages you're entitled at both stages, first of all, to have an attorney. And the Court is willing to appoint you an attorney for both of those. I think we've covered that pretty fully already.

DEFENDANT: This just involves the murder in the first degree charge?

THE COURT: Yes, the waiver of trial by jury only pertains to that one. And then the second stage, of course, is your punishment stage. And you're entitled to trial by jury for that even if you've already entered a plea of guilty to the other, you see?

DEFENDANT: What about the other two charges?

THE COURT: Those are not bifurcated trials. They're just one stage.

DEFENDANT: Okay.

THE COURT: When a plea of guilty is entered as to those then the Court orders a presentence investigation and the Court will in all probability order a presentence investigation as to CR185-491, the first degree murder charge as well.

And then the case is set over and we wait until that's done. That usually takes five or six weeks. And then a hearing would be held on the second stage for anything that the prosecutor wants to present or anything that you want to present.

And then after making some determination on that reviewing the presentence report, the Court would then make the final determination in the case, in the cases, in all cases. As a matter of fact we'd probably do all of those at the same time.

DEFENDANT: Okay.

MR. HARMAN: Perhaps his question, Judge, is just whether or not he's going to have a jury trial on the other charges?

DEFENDANT: That is correct.

THE COURT: I beg your pardon?

DEFENDANT: I was wondering if I was going to have a jury trial on the other charges?

THE COURT: You can have it if you want it.

DEFENDANT: I do not, your Honor.

THE COURT: Well,----

MR. HARMAN: I thought that's where he was going.

THE COURT: I'm sorry, I didn't understand that.

Yes, you're entitled to trial by jury on all charges. And you will see by those forms that I have just given you, and you'll have plenty of time while you awaiting for this to come up a week from this Friday, to study those out.

And prior to that I'll tell you that you're entitled to trial by jury on all of these matters. And you do not have to plead guilty to any of these charges.

But, I wanted to give you those so you would have plenty of time to look them over and fill them out. And if you had any questions about them before we start the procedure at any point, you're free to ask me or to ask Mr. Duchardt and we'll be glad to help you with that.

Now, do you have anything that you wish to ask the Court at this time?

DEFENDANT: No, your Honor.

MR. HARMAN: I have one question; you do understand that when the Judge gives these to you in advance with the suggestion that you can fill them if you want to fill those out ahead of time, you don't have to enter a plea of guilty. Do you understand that?

DEFENDANT: Yes, I do.

THE COURT: And nobody is, well, we've covered that before----

MR. HARMAN: I know we have, but just the last comments that you can take those back and fill them out, I just thought let's make it clear that at this point we're not saying that he's made his decision irrevocably or such that it couldn't be changed, your mind can't be changed. It can be changed if you want it to be changed.

THE COURT: It can be changed at any point up until the time the Court accepts your plea of guilty. After that time you will not be permitted to withdraw your plea if you've given one, do you understand that?

DEFENDANT: Yes, sir.

THE COURT: Now, I understand Mr. Duchardt when he was actively representing you in this case advised you that he did not think it would be in your best interest to enter a plea of guilty, is that correct?

DEFENDANT: Yes, your Honor.

THE COURT: All right, and the Court concurs with his decision in that matter. And you understand that as well, I've told you that before, I think.

DEFENDANT: Yes, you have, your Honor.

THE COURT: And I think it's in your best interest that you have the active participation of your attorney in the case rather than just the designation I've given Mr. Duchardt as an advisor upon request. And that would be upon your request, you see.

But, I want you to know that at any time during any of these proceedings you can change your mind and if you want Mr. Duchardt or the public defender office to represent you fully as a lawyer and not, as opposed to your representing yourself as you now are doing, the Court will then appoint that office or Mr. Duchardt to represent you fully in one or all of these cases.

Do you have any questions at all about that?

DEFENDANT: No, your Honor. I thought I made that quite clear.

THE COURT: Well, I just, I thought that we had, but I wanted to cover it sometimes even more fully than we had before to make sure that you did understand that.

And do you have any questions about any of these proceedings now?

DEFENDANT: No, your Honor.

THE COURT: Very well, unless you have something else I believe that will be all. We'll take these matters up again on May 9th.

And, again, after looking over all of those forms, if you have questions or if you don't want to sign them you can advise the Court of that and we'll take it up at that time.

DEFENDANT: Okay, I understand.

THE COURT: That'll be all.

* * * * * * * * * * *

The following proceedings came on before the Honorable Glennon E. McFarland, Judge of Division One of the Seventh Judicial Circuit of Missouri, at Liberty, on Friday, May 9th, 1986.

The defendant was present in person throughout these entire proceedings.

Mr. Fred Duchardt, Clay County Public Defender, was present in person throughout these entire proceedings.

Mr. Larry Harman and Mr. James B. Chancellor were present for the State.

The following proceedings were had:

THE COURT: State of Missouri versus Heath A. Wilkins. There are three cases CR185-490, 491, and 492. We'll take up first CR185-491FX.

MR. DUCHARDT: Judge, before we begin I'd like make a brief record, if I may.

THE COURT: Very well.

MR. DUCHARDT: I believe Mr. Wilkins is desiring to persist with his indications to the Court earlier that he wishes to enter pleas of guilty to the charges before the Court.

I again advise him that it's my belief that he should not persist with this. And I believe he

understands fully my position that I do not intend to assist him with this matter.

Of course, my position, as I understand it from the Court's special appointment, is merely to answer any questions that Mr. Wilkins might have in connection with whatever he wishes to do.

He is now handling his cases pro se.

In that regard the only thing which I have done since the last time that we appeared in court, this morning Mr. Wilkins asked me some technical questions concerning the petitions to enter plea of guilty. Specifically asking me what the ranges of punishment were, the precise ranges of punishment for each of the charges.

He also asked me concerning the answers, what would be an appropriate answer to the question concerning his past mental illness history.

And I advised him that if the information in the mental examination reports was complete and accurate as far he knew, that he should just refer the Court to that information for purposes of the guilty plea petition.

Also Mr. Wilkins informed that, of what he believed to be mistreatment at the Clay County Jail. I advised him to bring that matter to the attention of the Court.

That's all I've talked with him about.

THE COURT: Very well. Mr. Wilkins, are you ready to proceed?

DEFENDANT: Yes, I am.

THE COURT: Is the State ready to proceed?

MR. CHANCELLOR: Yes, your Honor.

THE COURT: Now, we'll proceed first with CR185-491FX.

Mr. Wilkins, I see that you have appeared previously in this Court, the last time being April 23rd, 1986.

And at that time you stated to the Court that you wishes to proceed without a lawyer. And the Court encouraged you to proceed with a lawyer. The Court pointed out many things that would be of benefit to you if you had a lawyer and how you might suffer by not having a lawyer.

And after going through all of that the Court finally granted your request that you be permitted to represent yourself.

And at that time I ordered that Mr. Duchardt remain available for consultation throughout the remainder of the proceedings.

Is that as you remember it?

DEFENDANT: Yes, your Honor.

THE COURT: Now then, I want to again tell you that the Court now still encourages you to seek the assistance of Mr. Duchardt. And I told you previously that at any time throughout the proceedings if you

wanted Mr. Duchardt's position as your advisor or counsellor to change that I would change that and that I would order that he represent you.

Do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: Now, until you ask that that be done you are representing yourself with whatever aid and assistance you ask him to do for you.

Do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: Now, I at this time again encourage you to accept the services of the public defender officer, and in particular Mr. Duchardt. I think it would be to your benefit to be assisted by counsel throughout these proceedings for all of the reasons I've previously mentioned. And I can't think of any others that I didn't previously mention, but for all of those reasons. And there may be more that I can think of, but certainly because of your age, your limited education, your limited legal education, which you have none; and even to the extent that he's had more experience in life generally than you have to this point.

And as I explained to you this is a very serious step. If the Court does accept your plea of guilty that you've previously indicated that you wanted to offer to the Court, if the Court accepts that thereafter you will not be permitted to withdraw that plea, you see?

DEFENDANT: I know.

THE COURT: Do you understand all of that?

DEFENDANT: Yes, your Honor.

THE COURT: Now, knowing all of this what is your desire here today?

DEFENDANT: I'd like to proceed with what I've indicated, your Honor.

THE COURT: And what is that?

DEFENDANT: To plead guilty to murder in the first degree, armed criminal action, and unlawful use of a weapon.

THE COURT: Of course, you understand if you are asking to enter a plea of guilty here today that in order to do so you must first waive any right that you have to trial by jury?

DEFENDANT: Yes, your Honor.

THE COURT: And have I given you a form regarding waiver of----

DEFENDANT: Yes, your Honor, you have.

THE COURT: --(indicates) and is this the form that I gave you?

DEFENDANT: Yes, your Honor.

THE COURT: This shows that you're 17 years of age and that you've completed 9 years of schooling.

And in this waiver form it sets forth that the trial of a first degree murder case in this State is a bifurcated or two stage trial.

DEFENDANT: Uh huh.

THE COURT: And it indicates that one of those would be the stage where you would, where a determination of guilt or innocence would be made and the second would be the sentencing stage.

Do you understand that?

DEFENDANT: Yes.

THE COURT: And you do understand that you have a right to have a lawyer at both of these stages. And you also have a right to trial by jury at both of these stages?

DEFENDANT: Yes, your Honor.

THE COURT: And is the first stage that we're talking about now, the guilt or innocence stage, do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: Is there anything about this form that you did not fully understand?

DEFENDANT: No, your Honor.

THE COURT: Were there any threats, promises, or other inducements made by anyone to get you to sign this form?

DEFENDANT: No, your Honor.

THE COURT: Or to make this decision that you're now making here today to represent yourself, waive your right to trial by jury, and to enter a plea of guilty to this very serious charge?

DEFENDANT: No.

THE COURT: There hasn't been any pressure of any kind exerted on you?

DEFENDANT: Huh uh.

THE COURT: I believe you told me previously, either you did or Mr. Duchardt did and you agreed with it, as I recall, that you started talking to Mr. Duchardt back as far as January of this year and indicated to him that you no longer wanted his representation and that you wanted to waive your trial by jury and enter a plea of guilty as you're doing here today----

DEFENDANT: That is correct.

THE COURT: ----Is that correct?

DEFENDANT: Yes.

THE COURT: And had you given this a lot of thought even before that time and before you told Mr. Duchardt, first told Mr. Duchardt about it?

DEFENDANT: Yes, your Honor.

THE COURT: And have you thought a lot about it since?

DEFENDANT: Yes, your Honor.

THE COURT: And have you had, and I believe Mr. Duchardt has talked to you quite a bit about that between the period of January and April 23rd when we had the last hearing on the matter, is that correct?

DEFENDANT: No, your Honor.

THE COURT: And did he not consistently advise you that he thought it would be in your best interest that he be allowed to continue his representation in the case?

DEFENDANT: He did, your Honor.

THE COURT: Have you had an opportunity to talk to anyone else that you might want to talk to in regard to those questions about representing, representation by your lawyer or waiver of your trial by jury?

DEFENDANT: Plenty of opportunity, your Honor.

THE COURT: Have you talked to anyone else about it?

DEFENDANT: Everybody that needs to, everybody that it needs to be discussed with, yes, your Honor.

THE COURT: And after all of that do you still want to appear here today and waive your trial by jury and enter a plea of guilty to these very serious charges?

DEFENDANT: Yes, your Honor.

THE COURT: And you do understand that one of the charges, murder in the first degree charge, carries the possible death penalty?

DEFENDANT: Yes, your Honor, I'm aware of that.

MR. DUCHARDT: Your Honor, may I just include for the record what Mr. Wilkins told me back in January was not only that he wanted to enter pleas of guilty to the charges, but he wanted to do that specifically so that he might obtain the death penalty.

And that was, it was not strictly that he wished to enter pleas of guilty. And, certainly, the, our difficulties did not arise necessarily because of his desires to enter the pleas of guilty to the charges. Our difficulties arose, and I think Mr. Wilkins would agree, because his desire was to enter pleas of guilty for the expressed purpose of obtaining the death penalty.

Is that a fair statement, Mr. Wilkins?

DEFENDANT: That is correct as it has been stated.

THE COURT: Well, Mr. Wilkins, at one point in the proceeding, if my memory is correct, I told you that, when I was trying to impress you with the seriousness of your decision, I told you that if you persisted with this the Court very probably would enter a death penalty.

DEFENDANT: Yes, your Honor, that's why I do not, did not state what he has just stated.

THE COURT: Well, now I want to tell you something else, that this Court has not made up its mind as to what penalty would be imposed in the event I accept a plea from you here today in any of these cases.

DEFENDANT: I'm well aware of that.

THE COURT: And I might very well go against your recommendation whatever it might be even if you change your mind about it.

DEFENDANT: That's a possibility.

THE COURT: Do you understand that?

DEFENDANT: Yes.

THE COURT: Now, do you understand that any, if you persist here today and if I accept your plea of guilty to any or all of these charges, and I'm talking about, I guess in particular to CR185-491FX, that's the first degree murder charge, if I accept your plea to that then there would be a second stage of that, you see, to assess the punishment.

DEFENDANT: Uh huh, yes.

THE COURT: Now, you would have a right to have a jury make the assessment of your punishment at that time, you see. And you might be able to convince them better than the judge that you, whether you want the death penalty or by that time whether you don't want it, you see? And you can exercise that right to have that trial by jury clear up at any time in the

proceedings until the sentencing is done. Do you understand that fully?

DEFENDANT: Uh huh, yes.

THE COURT: So, I want you to understand that fully if, even though you may want the Court to accept your plea here today, that you can always change your mind about the other later on and have the jury assess your punishment, is that clear?

DEFENDANT: Yes, your Honor.

THE COURT: But, of course right now we're talking about waiver of right to trial by jury to determine your guilt or innocence in this matter.

And I'll ask you one more time, are you sure that you want to waive your constitutional right to have a trial by jury and to enter a plea of guilty to, first of all, the charge of murder in the first degree?

DEFENDANT: Yes, your Honor.

THE COURT: Would you please raise your right hand and receive the oath of the Court. **Heath A. Wilkins**, being first duly sworn by the deputy circuit clerk, was examined as follows:

EXAMINATION BY THE COURT:

Q. Mr. Wilkins, I think before we go any further, I've told you many times in this proceeding that you did have a right to remain silent, you do not have to incriminate yourself, and whatever you say

can and will be used against you throughout the entire proceedings, isn't that right?

A. That's correct.

Q. And I've told you that on many occasions, haven't I?

A. Uh huh.

Q. And the petition to enter plea of guilty that I gave you and asked that you fill out, and which does not carry your signature on the bottom—

A. Not until you looked it over, your Honor.

Q. This also tells you that you have a right to remain silent, does it not?

A. It does.

Q. Now, this petition relates to CR185-491FX. Did you understand everything that you read on each page?

A. Yes, your Honor.

Q. Did you have the opportunity to talk to Mr. Duchardt about anything that you might not've understood?

A. I did.

Q. Is everything true in this petition as far as you know?

A. Yes, your Honor.

Q. And, again, you understand that you don't have to incriminate yourself, you have a right to remain silent. And are you saying that you wish to waive your right to remain silent, are you saying that you wish to waive your right to remain silent and proceed here today?

A. Yes, your Honor.

Q. Now then, this guilty plea petition consists of six pages. One of the things in here, even though you've not signed it, it says, question number 18, "I do not have any complaints against any law enforcement officials concerning my treatment while in jail. I had sufficient food, water, medical care, and bedding and I was not mistreated by any inmate while in jail. There are no exceptions to any of these statements except," and you put yes there.

"I suffered abuse verbally and physically, 10:40. May 9th, 1986, before entering the court."

A. That is correct.

Q. Do you wish to tell the Court more about that?

A. Yes, I do, your Honor. I was proceeding to speak out of the holding cells that they have back here (indicates). And I was told to shut my mouth.

And I made the statement as I have a right to speak. And I was told to shut my mouth. And

then the officer, I'm not absolutely aware of the officer's name but it's the gentleman standing here at the end of the counter (indicates), went back in here to do his business.

Well, he came back some time later and picked me up. And I asked him why he told me to shut my mouth.

I said, "Couldn't you have stated something like be cool or something like that?"

And he told me when he tells me to shut my mouth I shut my mouth. And I made the statement as, "You're in a bad mood today, aren't you?" And then he said with a bad mood," Any mood I'm in is no concern of yours."

And then I told him that he didn't have to come off to me that way. And he pushed me in my face up against the wall and told me that, you know, he can do whatever he wants or something along the lines of you know, there's nothing I can do about it, he can do what he wants.

And when I told him that wasn't so he said, he goes, "You're nothing but a bad assed murderer." And he made a statement, oh, yeah, he said, "What are you going to do about it?"

And he was up in my face when this, you know, he did, he pushed me in my face against the wall and made a statement that I was a bad assed murderer.

And then he asked me what I was going to do about it and I didn't say nothing. I just looked at him. And he was right up in my face. And he said, "I thought so." And then he left and we came in here.

Q. All right. Is that the extent of your complaints against your treatment, or about your treatment?

A. Verbally and physically, yeah.

Q. Do you have any other complaints about your treatment while in jail?

A. No.

Q. All right, now, I'll ask you this, as to this treatment that you've complained about, did that have anything to do with your decision to come in here today and waive your right to trial by jury and tell the Court that you want to plead guilty?

A. No, it did not, your Honor.

Q. It had nothing at all to do with it?

A. Not that I'm aware of.

Q. Okay. Did you want to sign this petition to enter plea of guilty?

A. Yes, your Honor.

(Judge hands petition to enter plea of guilty to defendant who signs it and hands it back to the judge.)

Q. Mr. Wilkins, I see now you've apparently signed the pages of the guilty plea petition, or petition to enter plea of guilty. I want to tell you that you do not have to submit that to the Court, of course.

The rule generally here is that I have the attorneys have their clients fill those things out before they enter a plea because that's part of the proceedings in that.

But, again, you have a right to remain silent and nobody is forcing you to give the Court your petition to enter plea of guilty.

Now, knowing that do you want the Court to take your petition?

A. Yes, your Honor.

Q. Very well, I will do so. Now then, your name now appears on the bottom of each page. Did you sign all of those pages?

A. Yes, your Honor.

Q. And did you read everything above your signature before you signed it?

A. That is correct, your Honor.

Q. And did you understand everything that you read?

A. I did, your Honor.

Q. And you do understand in connection with any plea of guilty that you may give here today that you're entitled to all of the rights set forth in this petition?

A. Yes, your Honor.

Q. Now then, are you, what is it you wish to do with regard to the previous plea that you've made to this Court? Your previous plea was a plea of not guilty and not guilty by reason of mental disease or defect excluding responsibility.

A. Throw it in the trash, your Honor.

Q. Throw it in the trash. Are you saying that you wish to withdraw it?

A. I don't know what you do with it, but get rid of it.

Q. Okay, get rid of it. Are you saying that you want to withdraw your previous plea or not? I'm not trying to put words in your mouth?

A. Yes, your Honor, that is what I'd like to do.

Q. And what plea do you wish to enter at this time?

A. A plea of guilty, your Honor.

Q. And you're talking about to the charge of Class "A" felony of murder in the first degree?

A. That is correct.

Q. Has there been any plea agreement entered into between you and the prosecuting attorney's office in connection with this case?

A. No, your Honor.

THE COURT: Mr. Prosecutor, is that as you understand it, there is no plea agreement at all?

MR. CHANCELLOR: That's correct, there is no plea agreement.

Q. Very well. Mr. Wilkins, are you making this plea voluntarily, and by that I mean is it your own decision?

A. Yes, your Honor.

Q. Have there been any threats or promises or other inducements of any kind to try to get you to enter this plea here today?

A. No, there have not.

Q. I see your petition shows you're 17 years of age. And we talked about that previously. That is correct, is it not?

A. Yes, your Honor.

Q. And you have 9 years of education?

A. Yes, your Honor.

Q. Can you read and write?

A. Yes, your Honor.

Q. Did you have any trouble in reading and understanding your petition to enter plea of guilty?

A. No, your Honor.

Q. And, again, I don't want to repeat but I'll say it one more time, you do understand now the charge to which you are entering a plea of guilty at this time, if you wish to do this, is the charge of murder in the first degree?

A. That is correct, your Honor.

Q. And that the range of punishment for that offense is the death penalty or life imprisonment with no probation, parole, or release except by act of the Governor?

A. That's correct, your Honor.

THE COURT: And that is the correct range of punishment, is it not, Mr. Prosecutor?

MR. CHANCELLOR: Yes, it is, your Honor.

Q. Mr. Wilkins, the charge in this case comes to this Court by way of information from the prosecuting attorney's office. It states that this occurrence is alleged to have occurred on July 27th, 1985.

And I noted in your petition to enter plea of guilty you say, "Murder, first degree." Well, the question was, "I represent to the court I did the

following acts in connection with the charge against me, 'murder, first degree, I stabbed Nancy Allen until death.'"

Would you want to tell me the facts constituting what happened on July 27th, 1985?

A. I took a knife and stabbed her once in the back, no specific area that I'm sure of, and three times in the heart and several times in the neck.

Q. Were there any other facts that led up to that, any other facts that would make the statement more complete?

A. It was premeditated, I did it knowingly.

Q. What do you mean by that?

A. I planned on it.

Q. Who did you plan it with?

A. I planned on killing Nancy Allen myself.

Q. When did you decide to do that?

A. Oh, no particular time really, I mean – no particular time.

Q. When you said it was premeditated what did you mean then?

A. Killing somebody was premeditated. Killing Nancy Allen was not.

Q. Just what did you really intend to do then, I think we need to get into that a little more explicitly, in more detail?

A May I ask why?

Q. Well, the reason is that this Court must determine factually whether or not you are really guilty of murder in the first degree before I can accept your plea.

A. Then would we be able to discuss the facts of what happened and not things that don't pertain to the act?

Q. Well----

A. What I planned on doing and what I did, I mean, those are totally, you know --.

Q. Well, if it pertains to this charge then I would ask you to relate it to the Court.

But, of course, you have a right to remain silent. You don't have to say anything if you don't want to.

A. I'll tell you.

Q. Proceed.

A. Okay. I planned in advance to kill, to kill somebody, so, I robbed the store and I knowingly, before, though, I planned out how to rob it, how to proceed in, how to make sure

nobody else was around, how to go about it, do it fast and without making a mess.

Q. And when did you do all of this, how much prior to the time it happened?

A. Oh –

Q. Generally and everything?

A. That I planned it out and everything?

Q. Yes.

A. I'd say about a week to two.

Q. And why was it that you intended, were you intending to just go there and kill and nothing else? You need to, is there something else that I don't know about?

A. I don't understand your question, your Honor.

Q. Well, did you intend just to go to the store to kill somebody or was it for some other purpose?

A. I, it was ---

Q. Was this a type of liquor store or food store?

A. Yes, it was a liquor store and deli.

Q. And deli, all right. That's where Nancy Allen was, is that correct?

A. Yes.

Q. And you had planned to what at that store?

A. Oh, what we did was we robbed it and we took some merchandise, some money, and a life.

Q And had you planned to do that before you did it?

A. Yes.

Q. And did you have a weapon with you?

A. Yes, your Honor.

Q. What weapon did you have?

A. A knife.

Q. And had you planned taking the knife and using that in connection with the offense?

A. Yes, your Honor.

Q. Well, tell me about that, what was your plan in connection with the use of the knife?

A. To proceed into the store and stab somebody, whoever was behind the counter.

Q. Why did you feel you had to stab someone? Why did you do that?

A. No witnesses.

Q. No witnesses. What do you mean, no witnesses?

A. A dead person can't talk.

Q. That's why you----

A. And identify you.

Q. They can't identify you and that's why you did it?

A. Uh huh.

Q. Let me make sure I'm right, now, this happened on the 27th of July, 1985. These plans or whatever you had, were they formulated prior to July 27th of 1985?

A. Yes, your Honor.

Q. About how much prior?

A. A week to two weeks, your Honor.

Q. And when you were doing the stabbing did you intend to kill her, Nancy Allen, when you stabbed her?

A. Yes, your Honor.

Q. And was that for the purposes of preventing her from later appearing against you as a witness in a proceeding?

A. If I got caught, your Honor.

Q. Okay. And is that the only reason you stabbed her to death at that time?

A. Yes, your Honor.

THE COURT: Mr. Prosecutor, do you have any facts that you think the Court, that should be related to the Court in addition to these? Did this happen in Avondale, Missouri, is that right?

DEFENDANT: Yes, your Honor.

THE COURT: And that's in Clay County, Missouri, is that right?

DEFENDANT: I guess so. I would assume so, I'm here.

MR. CHANCELLOR: Your honor, the address of the liquor store was 2600 North Bell Road in Avondale, Clay County, Missouri.

The only facts that I can add was that this defendant had planned on committing a robbery and killing someone for a couple of weeks.

A plan was developed where he and the three other people involved would go to the North Kansas City Hospital, which is not too far from the liquor store. The defendant and this other person, Patrick Stevens, took a change of clothes with them; walked over the hill to the liquor store, went in at almost closing time.

The plan was for Patrick Stevens to go to the bathroom, or fake going to the bathroom, which he did. And the defendant asked Nancy Allen to make a sandwich for him which had to get her behind the counter in the deli.

As soon as she did, Patrick Stevens came out and grabbed her. And that's when the defendant stabbed her the first time.

Nancy Allen fell to the floor. She'd been stabbed somewhere in the back. I believe it was her kidney or the liver.

The Stevens boy went ahead with taking merchandise. In the meantime I believe Nancy Allen kept talking. And the defendant then proceeded to stab her in the heart and in the throat, mainly in the throat three or four times, to shut her up.

And he knew his actions, what he was doing, at that time he knew that his actions would cause her death.

After the robbery they went back to the hospital. They called two cabs, two separate cabs. The cabs came and took, I believe, the defendant and Stevens to the bus station downtown. And the girl, Margaret Filipiak, and Ray Thompson went in a separate cab.

They went to the bus station in Kansas City where they split the money up. Then they switched partners and Patrick Stevens and Ray Thompson got in one cab and about an hour later the defendant and Margaret Filipiak called another cab.

And then subsequently they met back in the Clay County area around Sherwood Lake.

Then I believe the defendant disposed of the murder weapon, which was known as a butterfly knife.

It was disposed of, from everything we can find out, by throwing it in that lake. And it was never found.

FURTHER EXAMINATION OF THE DEFENDANT BY THE COURT:

Q. Mr. Wilkins, did you hear the statement of fact as related by the assistant prosecuting attorney?

A. He stated it correct, your Honor.

Q. Has he stated, was it entirely correct? Was there anything that he said that was not true?

A. He did not say anything untrue, your Honor.

Q. Does anything need to be added to his statement or taken from it to make it more true and correct or to make ir more understandable to someone?

A. I guess you could state that when we arrived at the park we proceeded to dispose of the evidence.

Q. Anything further?

A. Most of it, anyway.

Q. Anything else?

A. No.

Q. All right. Mr. Wilkins, you do understand that you don't have to plead guilty, and by that I mean you do have a right to trial by jury? We've

covered that many times and you do understand that fully now?

A. Yes, your Honor.

Q. And you understand you have the right to trial by jury at both stages of this proceeding?

A. Yes, your Honor.

Q. And, of course, you do understand that whether you, in the event you had a trial, whether it be trial by jury or any other kind of a trial, for that matter, that you'd be entitled to a lot of rights in connection with that trial.

A. Yes.

Q. Some of those would be those that are contained in your petition to enter plea of guilty, you do understand that?

A. Yes, your Honor.

Q. And among those would be the right to have an attorney with you to aid and assist you throughout the entire proceeding. And you'd be presumed innocent throughout the entire proceeding. And the burden of proving your guilt beyond a reasonable doubt would rest with the State. They would have to prove each and every element of the offense beyond a reasonable doubt or you'd be entitled to go free and the jury would be properly instructed in that regard.

You'd have the right to confront and cross-examine all witnesses that appear against you and to call witnesses in your own behalf by compulsory process.

Now, when I say compulsory process I mean basically by subpoena. You could make people come in and testify for you whether they wanted to or not.

You'd also have the right to remain silent. You wouldn't have to incriminate yourself. We've talked about that previously, but I'll tell you more than that, if you chose to exercise your right of silence no one could even comment about that in the presence of the jury.

And if you were dissatisfied with the results of all of those trial proceedings, you'd always have the right of appeal.

Now, do you fully understand all of those rights?

A. Yes, your Honor.

Q. And do you fully understand that by entering your plea of guilty here today you forever waive any right that you might have to trial by jury or to any other kind of a trial, and you also waive all of those rights that we've just talked about, including all of these set forth in your petition to enter plea of guilty?

A. Yes, your Honor, I understand that.

Q. And you're sure that's what you want to do?

A. Yes, your Honor.

Q. And I don't want to beat a dead horse, but you're sure you don't want a lawyer, you don't Mr. Duchardt to come up here and help you out?

A. I do not want him up here.

Q. As anyone told you, obviously no one has told you that you'd get probation or probation or parole, I take it, or has anybody told you that you'd get any particular punishment or sentence?

A. No, your Honor.

Q. I want you to know that if I accept your plea today that I will order a presentence investigation. That means an investigation would then be conducted by the Missouri Department of Probation and Parole.

As a result of that investigation a written report will come to this Court. And I would review the information in that report in making my decision about the case.

It normally takes around six weeks or longer for the preparation of that report. Do you understand all of that?

A. Yes.

Q. Now, have you had any drugs or alcohol or medicine within the last 48 hours?

A. No, your Honor.

Q. Your head is clear at his time?

A. Yes.

Q. And do you have any history of mental disease or illness of any kind, other than the information that is contained in documents that the court has previously reviewed from, let's see, (examines documents) one of those being the examination by Doctor William S. Logan, M.D. Is that one of the people?

A. Yes, your Honor.

Q. And where did you go to see Doctor Logan? That was March 20th of this year, wasn't it?

A. Just a second and I'll make sure, your Honor. (examines papers.)

Q. All right.

A. Yes your Honor, that was March 20th.

Q. And Doctor Logan is with the Menninger Foundation, is that right?

A. Yes, your honor.

Q. And do you, you also received psychological testing at the Menninger Clinic in Topeka, Kansas, is that correct, or from those people there?

A. Yes, from those people.

Q. From those people. And do you have a copy of what is called the diagnostic interview report?

A. Yes, your Honor.

Q. And also the psychological test report?

A. Yes, your Honor.

Q. The psychological test report is dated 4-8-'86?

A. Yes.

Q. And the diagnostic interview report bears the date, it says, "Date seen, March 20th, 1986" on the front. And it is signed at the end by William S. Logan, M.D. and dated 4-11-'86, is that correct?

A. Yes, your Honor.

Q. And were you also seen by a Doctor Steve Mandracchia with the Western Missouri Mental Health Center?

A. Yes, your Honor, I was.

Q. And did he also render a report in regard to your case?

A. Yes, your Honor, he did.

Q. And all of these, all of the psychological or psychiatric problems that you've had in the past, are they set forth in these reports?

A. Yes, your Honor, they are.

Q. Mr. Duchardt, do you know of any additional information about his mental or emotional condition other than as set forth in those reports?

MR. DUCHARDT: Your Honor, there's a considerable amount of information which is contained in the juvenile files maintained by this Court in the juvenile court facility.

A considerable amount of information from some of the inpatient diagnostic centers, diagnostic and treatment centers where Mr. Wilkins resided during his earlier years.

Most of those, most of the documentation pursuant to those stays were provided to Doctors Mandracchia and Logan. I don't think necessarily all of that information was made available to those men, but those would be the other sources of information concerning Mr. Wilkins that I'd be aware of.

THE COURT: All right. And I previously note from my record that a hearing was held in this Court previously. And, as a matter of fact, it was on April 16th of this year, regarding your competency to proceed.

And the Court heard the testimony of these doctors at that time that I've talked about and at that time found you competent to proceed.

I believe that I asked you at that time if you agreed with the recommendation and with the

opinions of the doctors that you are competent to proceed in this case and you said that you were, is that correct?

A. That is correct.

Q. Do you still feel that way today?

A. Yes, I do.

Q. Very well. Has anyone told you that you should respond to the Court's questions here today with anything other than the truth?

A. No, your Honor.

THE COURT: Mr. Prosecutor, do you know of any witnesses or evidence which would cast a reasonable doubt upon the defendant's guilt or defenses available to the defendant which have not been disclosed to the Court?

MR. CHANCELLOR: No, your Honor.

Q. And you, Mr. Wilkins, do you know of the existence of any witness or of any facts, circumstance, or evidence which has not been presented to the court which would exonerate you of the charge?

A. No.

Q. Exonerate means free you from the charge?

A. No, your Honor.

Q. Have you understood all of the Court's questions?

A. Yes, your Honor.

Q. Have you responded fully and truthfully to all of those questions?

A. Yes, your Honor.

Q. And are you offering your plea of guilty in this case because you are guilty as charged and for no other reason?

A. Yes.

Q. And do you ask the Court to accept your plea?

A. That is correct.

Q. Do you have anything else you wish to say to the Court at this time in connection with this case?

A. No, your Honor.

Q. Is there anything at all about the entire proceeding that you do not fully understand?

A. No, your Honor.

THE COURT: Mr. Prosecutor, do you have anything you wish to ask or anything you wish to say?

MR. CHANCELLOR: Yes, I do, your Honor.

THE COURT: Proceed.

MR. CHANCELLOR: If I may direct my comments to Mr. Wilkins.

EXAMINATION BY MR. CHANCELLOR:

Q. Mr. Wilkins, do you know who I am?

A. Yes.

Q. My name is Jim Chancellor. I'm assistant prosecutor. And you've seen me in court several times, haven't you?

A. Yes, I have.

Q. Okay. Now, being in law enforcement I'm again going to advise you of your right to remain silent. You do not have to incriminate yourself and anything you say can and will be used against you in this court proceedings, do you understand that?

A. Yes.

Q. Okay. And Mr. Duchardt, who has been appointed to assist you in this, is still sitting in the courtroom, is that right?

A. Yeah.

Q. Okay, and have you had any questions of him up until this time?

A. Yes, and they've been dealt with.

Q. Okay, and as I'm walking to you if you have any questions at all about what I'm saying, will you still go to him and ask him his advice?

A. Yes.

Q. And you realize that, okay. Number one, Mr. Wilkins, the State intends to file with the court a motion to take depositions to preserve testimony in this case, in other words we're going to take depositions of essential witnesses so if the case would ever go to trial in the future we could use those depositions in lieu of the witnesses if they are not available.

Do you have any objections to the State doing that?

A. No.

Q. Okay, and the State will also ask that you or, since you are pro se and you are a defendant, that you will be present during those depositions. Would you have any objections to that?

A. No, I would not.

Q. Okay. Also at the sentencing hearing which will be set when the judge sets it sometime down the road, after your presentence investigation is finished the State intends to put on evidence as to basically the facts of the crime and evidence of aggravating circumstances during the crime.

And the State will call basically the witnesses you heard in your preliminary hearing. Do you remember your preliminary hearing?

A. Yes.

Q. Okay. And, of course, the State will introduce any evidence as to aggravating circumstances, such as killing someone to take money, evidence of depravity of mind in that you tortured Nancy Allen, and that you murdered her to keep her from being any sort of witness, do you understand that?

A. Yes.

Q. The State will, if you will go to Mr. Duchardt, put on any evidence at all, at all, that you wish the State to put on. In other words, you have a right to put on mitigating circumstances such as your age, your mental capacity at the time, and the State, I'll tell you right now, intends to call Doctor Logan. Do yo remember Doctor Logan?

A. Yes, I do.

Q. Okay. And the State will do whatever you wish if you tell Mr. Duchardt to put on any mitigation circumstances, to call any witnesses which you want. Do you understand that?

A. Yes.

Q. So, if you want that done you tell Mr. Duchardt, okay?

A. I'm aware of that.

Q. Is there anything about what I've said this morning that you do not understand?

A. No.

Q. And, again, as the Judge said, during the sentencing hearing you'll have a right to a jury, do you understand that?

A. Uh huh.

Q. And if you want a jury you can have a jury?

A. I understand that.

MR. CHANCELLOR: I have nothing further, your Honor.

THE COURT: All right, I'll make the entry and then I'll read it.

Mr. Wilkins, I have written my entry in this case. After I read this entry I will have accepted your plea of guilty to this charge.

I'll ask you one more time, and after that time you'll not be able to withdraw your plea, do you understand that?

DEFENDANT: Yes, your Honor.

THE COURT: And do you now wish to withdraw you plea and not proceed further?

DEFENDANT: No, I do not, your Honor.

THE COURT: And you're asking that I go ahead and accept your plea and read the entry?

DEFENDANT: Yes, your Honor.

THE COURT: I've made this entry; "Comes now State by assistant prosecuting attorney and defendant in person. Fred Duchardt also appears. Defendant waives trial by jury, withdraws plea of not guilty and not guilty by reason of mental disease or defect excluding responsibility and enters plea of guilty to the charge as filed.

The Court finds that defendant's plea of guilty is made voluntarily and intelligently and with full understanding of the charge and consequences of the plea and with understanding of his rights attending a jury trial and the effect of a plea of guilty on those rights.

The Court also finds that there is a factual basis for the plea. The Court, therefore, accepts the plea of guilty to the charge of the class 'A' felony of murder in the first degree.

Presentence investigation ordered and cause continued to June 27th, 1986, at 9:30 a.m."

That will be all insofar as CR185-491FX is concerned.

* * * * *

Supreme Court, U.S.
FILED
DEC 3 1998
CLERK

No. 98-674

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

MICHAEL BOWERSOX,
Superintendent, Potosi Correctional Center
Petitioner,

v.

HEATH ALLEN WILKINS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

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Table of Contents

Table of Contents i

Table of Authorities ii

REPLY BRIEF FOR THE PETITIONER 1

The Petition for Writ of Certiorari is Not Moot 1

Conclusion 3

Table of Authorities

Judicial Decisions

Calderon v. Moore, 116 S.Ct. 2066 (1996) 1

Coleman v. Thompson, 501 U.S. 722 (1991) 2

The Petition for Writ of Certiorari is Not Moot

On October 13, 1998, Superintendent Michael Bowersox filed his Petition for a Writ of Certiorari. Petitioner seeks review of the judgment of the court below on June 8, 1998, affirming the grant of Respondent's Wilkins' application for writ of habeas corpus (App. 1).

On May 15, 1996, the District Court ordered that the conditional writ "shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his plea of guilty and commences proceedings to afford [respondent] a trial within sixty days of the date of this order." (App. 94). On September 1, 1998, the United States Court of Appeals for the Eighth Circuit denied Petitioner Bowersox's motion to stay issuance of the mandate pending the filing of the petition for writ of certiorari (see Appendix to Opposition to Petition for Writ of Certiorari -- hereafter "Opp. App." -- at 10).

In order to comply with the Order and Judgment of the District Court, respondent was permitted to withdraw his guilty pleas on October 30, 1998 (see Opposition to Petition for Writ of Certiorari -- hereinafter "Opp." -- at 10), i.e., within sixty days of the issuance of the mandate of the court below.

Respondent contends that as a result of the State's compliance with the District Court's Order and Judgment, "the issue which petitioner wants this Court to address is moot." (Opp. 11). To the contrary, as stated in Calderon v. Moore, 116 S.Ct. 2066, 2067 (1996), "a decision in the State's favor would release it from the burden of the new trial itself." Further,

respondent advocates an impossible choice: either the State comply with the federal court order and forfeit its right to enforce the state criminal laws by seeking review on a writ of certiorari or, to otherwise preserve the State's right, flagrantly disregard the authority of the federal judiciary.

Respondent also contends that, because he relied in part upon state law in his motion to withdraw his guilty pleas, that jurisdiction is accordingly frustrated (Opp. 12). The state court, however, in its order (see Opp. App. 6), did not rest on a state law ground independent of the federal question and adequate to support the judgment. See Coleman v. Thompson, 501 U.S. 722, 729 (1991). And in addition to his repeated citation to the decision of the court below in his "Motion to Withdraw Guilty Plea," (Opp. App. 1-3), respondent further argued before the state court that "an order allowing defendant to withdraw his pleas is necessary to comply with the mandate of the Eighth Circuit Court of Appeals." (Opp. App. 3).

Conclusion

WHEREFORE, Superintendent Bowersox prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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STEPHEN D. HAWKE
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98-674

IN THE UNITED STATES SUPREME COURT

October 1998 Term

This is a Capital Case

FILED
NOV 20 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

HEATH WILKINS,	)	
	)	
Respondent,	)	
	)	
vs.	)	Case No. 98-674
	)	
MICHAEL BOWERSOX,	)	
	)	
Petitioner.	)	

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW respondent, Heath Wilkins, pursuant to Rule 39, and respectfully requests that this Court allow him to file his opposition to petitioner's petition for writ of certiorari in forma pauperis. In support of this motion, respondent states that he is totally without funds or resources with which to pay any fees associated with this petition. Respondent further states that he has been found indigent and received appointed counsel at all stages of his federal court challenges to his conviction and death sentence and that undersigned counsel have been appointed in this action pursuant to the Criminal Justice Act.

Respectfully submitted,

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48 pp

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was forwarded by regular United States mail, postage prepaid, to:

Cassandra Dolgin
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102

on this 20th day of November, 1998.

Lisa A. O'Connor

Counsel for Respondent

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

HEATH A. WILKINS, Petitioner, vs. PAUL K. DELO, Respondent.	)	Case No. 91-0861-CV-W-5

ORDER

Before the Court is the motion of appointed counsel, Sean D. O'Brien, to authorize payment of interim fees of $125 per hour plus expenses. Good cause being shown, Petitioner's motion is granted. Accordingly, it is hereby

ORDERED that the hourly rate for appointed counsel Sean D. O'Brien be, and hereby is, set at $125.00 per hour and that said order shall be effective for services rendered from and after October 1, 1995. It is further

ORDERED that the clerk of the court be, and hereby is, directed to process and pay appropriate monthly, interim fee and expense applications submitted by Mr. O'Brien for his work in this matter.

Dated this 11th day of January, 1996.

/s/ Scott O. Wright

SCOTT O. WRIGHT, JUDGE
UNITED STATES DISTRICT COURT

ORIGINAL

DOC. # 72

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Michael Bowersox

Appellant,

vs.

Heath A. Wilkins

Appellee.

Appeal from the United States District Court for the Western District of Missouri

On counsel's motion the Court hereby grants an interim payment to be made to Sean O'Brien, appointed counsel in the above captioned appeal in the amount of [redacted].

November 12, 1996

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Heath Allen Wilkins,

Appellee,

vs.

Michael Bowersox,

Appellant.

Appeal from the United States District Court for the Western District of Missouri

Motion of appellee for appointment of co-counsel has been considered by the court and is hereby granted.

The clerk of this court is directed to enter his routine order appointing Prof. Ellen Y. Suni of Kansas City, Missouri under the terms of the Criminal Justice Act as amended.

September 3, 1996

Order Entered Under Rule 27B(a):

Michael E Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

No. 98-674

IN THE UNITED STATES SUPREME COURT

October 1998 Term

This is a Capital Case

HEATH WILKINS,

Respondent,

vs.

MICHAEL BOWERSOX,

Petitioner.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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Counsel for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

I. THE CASE IS MOOT 10

II. THE COURT BELOW GRANTED RELIEF NOT BECAUSE OF A HYPOTHETICAL FAILURE BY THE STATE TRIAL JUDGE TO MEET SOME "MECHANICAL FORMULA," BUT BECAUSE THE TOTALITY OF THE CIRCUMSTANCES ESTABLISHED THAT THE MENTALLY ILL JUVENILE OFFENDER'S WAIVER OF COUNSEL AND PRO SE PLEA OF GUILTY IN THIS CAPITAL CASE WERE NOT KNOWING, VOLUNTARY AND INTELLIGENT 13

1. Unlike the state courts, the courts below appropriately considered Wilkins' experienced defense attorney's repeated warnings that his client's waiver and plea were not knowing, voluntary and intelligent 16

2. Unlike the state courts, the courts below appropriately considered the testimony of mental health experts, including state-employed examiners Dr. Steve Mandracchia and Dr. Sam Parwatikar, that Wilkins' was mentally disturbed, and did not act knowingly, voluntarily and intelligently. 18

3. Unlike the state courts, the courts below appropriately considered Wilkins' isolation, youth, and his history of abuse and neglect in determining whether his waiver of counsel and plea of guilty were knowing, voluntary and intelligent. 21

4. The courts below appropriately considered the record of the state competency, waiver of counsel, plea, sentencing and postconviction hearings, in addition to the totality of the circumstances, in finding that Wilkins' plea of guilty and waiver of counsel were not knowing, voluntary and intelligent. 23

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Carafas v. La Vallee, 391 U.S. 234 (1968) 12

DeFunis v. Odegaard, 416 U.S. 312 (1974) 11

McCarthy v. United States, 394 U.S. 459 (1969) 23

Michigan v. Long, 463 U.S. 1032 (1983) 13

Parker v. Dugger, 498 U.S. 308 (1991) 19

Parker v. Ellis, 362 U.S. 574 (1960) 12

State ex rel City of Kansas City v. Meyer, 513 S.W.2d 414 (Mo. 1974) 10

State v. Arnold, 419 S.W.2d 59 (Mo. 1967) 10

State v. Blaylock, 394 S.W.2d 364 (Mo. 1965) 10

State v. Wilkins, 736 S.W.2d 409 (Mo. 1987) 8

United States v. Broce, 488 U.S. 563 (1989) 23

VonMoltke v. Gillies, 68 S.Ct. 316 (1948) 14

Wilkins v. Bowersox, 145 F.3d 1006, 1008 (8th Cir. 1998) 2, 7

Wilkins v. Bowersox, 933 F. Supp. 1496 (W.D.Mo. 1996) 15

Wilkins v. State, 802 S.W.2d 491 (Mo.) (en banc),
cert. denied, 502 U.S. 841 (1991) 9, 15

IN THE UNITED STATES SUPREME COURT

October 1998 Term

This is a Capital Case

HEATH WILKINS,	)	
	)	
Respondent,	)	
	)	
vs.	)	**Case No. 98-674**
	)	
MICHAEL BOWERSOX,	)	
	)	
Petitioner.	)	

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Court below affirmed the judgment of the district court finding that a psychiatrically disturbed sixteen-year-old offender's waiver of counsel and pro se plea of guilty to a capital charge were not knowing, voluntary and intelligent made. This Court should deny the petition for writ of certiorari because the petition has been rendered moot by an order of the state court granting respondent's motion to withdraw his pleas of guilty. Furthermore, petitioner mischaracterizes the opinions below to manufacture an issue not presented by this case. The courts below did not apply or require any mechanistic or ritualistic formulae, but instead properly and thoroughly examined the totality of the circumstances and correctly determined that Wilkins' waiver of counsel and pleas of guilty were not knowingly, voluntarily and intelligently made. There is thus no basis on which certiorari can properly be granted.

JURISDICTIONAL STATEMENT

In the absence of a "case or controversy," this Court has no jurisdiction under Article III of the Constitution. There is no longer a case or controversy in relation to this cause in that the Clay County Circuit Court on October 30, 1998, sustained respondent's motion to withdraw his plea, ordering that "guilty pleas in all three causes be set aside and held for

naught." (Respondent's supplemental appendix, pp. 4-6).[1] On that same day Respondent entered pleas of not guilty. (Id.). Thus, the convictions which were the subject of respondent's petition for writ of habeas corpus no longer exist.

STATEMENT OF THE CASE

The court below issued the writ of habeas corpus upon finding that a mentally ill juvenile offender's waiver of counsel and pro se plea of guilty to a capital charge were not knowing, voluntary and intelligent. Petitioner omits material facts which are an important part of the record and support the outcome below.

The state court record established that Wilkins was a severely abused child who was psychiatrically ill with a plethora of mental difficulties, which the court of appeals briefly summarized:

> From infancy through his teenage years, Wilkins suffered severe physical and emotional abuse at the hands of his mother and other adults in his life. He began abusing drugs as a kindergartner on his way to school. At the age of 10, he became a ward of the state as a result of his involvement in a burglary. A mental health evaluation at that time described Wilkins as a severely depressed boy with homicidal and suicidal tendencies. During the years that followed, he was transferred in and out of mental health facilities. By the age of 16, Wilkins was living on the streets with three other teenagers.

Wilkins v. Bowersox, 145 F.3d 1006, 1008 (8th Cir. 1998). The group of runaways included Wilkins, a girl called "Midget" and two older boys known as "Bo" and "Shades." They slept in a park and stole money for food. (P.C. tr. 253; Ex. P - 14, p. 5).

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[1]Although the state might have filed an interlocutory appeal of Judge Russell's order under Missouri Revised Statute § 547.200.2, no such appeal was filed. The five-day period within which to file a notice of appeal has expired, and the order of the Clay County Circuit Court is final. § 547.200.4.

On July 27, 1985, they robbed a liquor store and fatally stabbed the clerk, Nancy Allen, a twenty-six-year-old mother of two. (J.A. 255). All four teenagers were arrested on Saturday, August 10, 1985; (J.A. 217, 228) the following Thursday, the juvenile court certified Wilkins to stand trial as an adult on the charge of first degree murder.[2]

At Wilkins' arraignment, Public Defender Fred Duchardt told the court, "there is some question in my mind whether Mr. Wilkins is competent to proceed at this point." (J.A. 609). The court ordered a mental examination by state psychologist Steve Mandracchia, who concluded that Wilkins did not suffer from a psychosis, and that he was competent to proceed. He did not direct his examination toward other disorders not rising to the level of psychosis (P.C. tr. 779), except to "generally agree" with Wilkins' past psychiatric diagnoses. (J.A. 617).[3]

A second evaluation was performed in March and April, 1986, by Dr. William A. Logan, Director of Law and Psychiatry at the Menninger Foundation, and psychologist Melvin Berg. (J.A. 622). In January, 1986, Wilkins advised Duchardt that he wanted to be put to death. Although Dr. Mandracchia and Dr. Logan were aware of Wilkins' desire, neither was asked to examine the voluntariness of his decision. However, Dr. Logan indicated that Heath was operating under "several factual errors, not delusions but just errors of fact" relating to the crime and its consequences. He warned of Wilkins' "emotional impairment where he would not be acting in necessarily his own best interests," and concluded:

---

[2]Petitioner is mistaken that this was one month short of Wilkins' seventeenth birthday. (Petition for Writ of Certiorari, hereafter "Pet.," p. 4). Wilkins turned seventeen January 6, 1986, almost six months later. (P.C. tr. 760; Ex. P-14).

[3]In the state postconviction proceeding, Dr. Mandracchia indicated that Wilkins' score on psychological tests for mental confusion was "quite high," which correlates with poor judgment, acute stress and schizophrenia. (P.C. Tr. 768-71).

> So, really, weighing the two factors, he has a fairly good cognitive and rational understanding of what court procedures are about, but *there is some emotional things involved that could interfere with his decision making process at certain critical points.*

(J.A. 626) (emphasis added). Wilkins' desire to die was the product of a "pervasive developmental defect . . . stemming out of the kind of home environment and other past experiences that he's had." (J.A. 644) Dr. Logan believed that "eventually at some point [Wilkins] would change his mind." (P.C. tr. 512). Mr. Duchardt argued that there was "considerable question" about Wilkins' competence to proceed and "to make the kinds of choices particularly that come to bear in a capital case as is before the court." (J.A. 647). Judge McFarland summarily ruled from the bench that Wilkins was competent to proceed. (J.A. 647).

Wilkins then moved to proceed *pro se*. (J.A. 647-48). The court's inquiry included the following:

> THE COURT: You are not skilled in the law. And what is your age?
> DEFENDANT: Seventeen, Your Honor.
> THE COURT: And the extent of your education?
> DEFENDANT: Ninth grade, Your Honor.
> THE COURT: So, you are really not familiar at all with legal proceedings, are you?
> DEFENDANT: That is correct.
> THE COURT: During the course of making decisions you would not have the background of legal knowledge or experience that a lawyer would possess, isn't that correct?
> DEFENDANT: Yes, Your Honor. I'm not, I don't, okay, that is correct.

(J.A. 649). The court expressed reservations about Wilkins' request:

> THE COURT: But, on the other hand, at his age and with his lack of legal training and schooling and considering the seriousness of the offense, this court feels that the availability of legal counsel is essential so that he can rely upon it, at least if he wants to, you see?

(J.A. 650-51). The court told Wilkins with the advice of counsel, "you might make a different decision than you otherwise would."[4]

On April 23, 1986, the court resumed its inquiry into Wilkins' waiver of counsel. Judge McFarland advised Wilkins of his right to counsel, recited a partial list of his constitutional rights and told him that upon conviction he could receive the death penalty or life without parole. (J.A. 674-84). There was no discussion of lesser offenses such as second degree murder or manslaughter. When Judge McFarland asked Wilkins if he had discussed his decision with anyone else, he replied, "there's nobody else, nobody else who has a hand in my decision, your honor." (J.A. 680). Judge McFarland "strongly encourage[d]" Wilkins to accept the services of counsel. (J.A. 684). Mr. Duchardt again warned the court that "I personally don't feel that he's competent to make those decisions." (J.A. 686). The court told Wilkins, "I don't think it's in your best interest that you enter a plea of guilty." (J.A. 695). After a lunch recess, the court accepted Wilkins' waiver of counsel and granted Duchardt leave to withdraw. (J.A. 689-90).

On May 9, 1986, Wilkins entered *pro se* guilty pleas. The court again advised Wilkins to accept the services of counsel:

> . . . for all the reasons that he had previously mentioned. And I can't think of others that I didn't previously mention, but for all of those reasons. And there may be more that I can't think of, but certainly *because of your age, your limited education, your limited legal education, which you have none; and even to the extent that he's had more experience in life generally than you have to this point.*

(J.A. 713) (emphasis added). Wilkins told the court that before the hearing, one of the jail guards escorting him pushed his face into the wall and threatened him. The court asked

---

[4]Dr. Logan testified that with the guidance of counsel, Wilkins would change his mind about his wish to die. (P.C. tr. 471-72, 512).

whether this affected Wilkins' decision to plead guilty. Wilkins said it did not, and there was no further mention of the incident. (J.A. 723-26). The guard remained in the courtroom throughout the hearing.

The guilty plea proceeded with the court asking leading questions about Wilkins' understanding of his rights, and Wilkins answering either "yes" or "no." (J.A. 725-48). Still, there was no mention of any lesser, parolable offense. The court accepted Wilkins' pleas on all charges (J.A. 749, 758, 768-69) and scheduled sentencing hearings for June 27, 1986. (J.A. 769). Mr. Duchardt sat in the corner of the courtroom throughout the plea. (J.A. 778).

On June 27, 1986, the court sentenced Wilkins to five years for Unlawful Use of a Weapon, (J.A. 780) and life on Armed Criminal Action. (J.A. 783-84). Mr. Duchardt repeated his warnings, reminding the court of Wilkins' youth and ignorance of the law. Heath concurred, "Yes, I would say that I was quite ignorant in these proceedings." (J.A. 793-94).

At the sentencing hearing, the court addressed Wilkins:

> THE COURT: When did you first decide that you wanted to, or do you want to ask for the death penalty?
> DEFENDANT: I'm, I'm telling you, you know, I never stated flat out that I want the death penalty.
> THE COURT: Okay.
> DEFENDANT: I stated that I would prefer the death penalty over spending life in prison, you know.

(J.A. 791). The court outlined Wilkins' sole punishment options as "the death penalty or life imprisonment without probation or parole or release except by act of the governor." (J.A. 788). The court never asked if Wilkins understood the elements of first degree murder. The court reiterated Wilkins' ignorance of the law:

> THE COURT: And maybe I didn't go over that quite enough when I alluded to the things that I have previously told you, but, we do have the information about your age, your lack of education in the legal field, you know nothing, you absolutely know nothing about this type of proceeding, do you?

BEST AVAILABLE COPY

DEFENDANT: I wouldn't say absolutely nothing, Your Honor, but, yes, I would say that I was quite ignorant in these proceedings.

(J.A. 794). The prosecutor urged the court to sentence Wilkins to death. (J.A. 893-98). For the first time ever in the proceedings, the court asked Wilkins why he wanted to be put to death. (J.A. 900-01). Mental health experts referred to Wilkins' rambling, non-responsive soliloquy as evidence of Wilkins' thought disorder and ambivalent feelings about dying. (P.C. tr. 44-45, 47, 243, 338-40).

On appellate review of Wilkins' sentence, Wilkins again attempted to waive counsel. The court ordered psychiatrist Sam Parwatikar to "examine appellant and make a report to this Court on the question of appellant's competence to waive his right to counsel." (Ex. P-32). Dr. Parwatikar reported that Wilkins "was not capable of waiving his constitutional right to counsel." (P.C. tr. 849-50, 852, 857). He also testified that Wilkins' "decision to discharge his attorney was based on faulty reasoning..." (P.C. tr. 850). He observed that Wilkins vacillated in his decision, and offered contradictory and faulty reasons for seeking the death penalty--some of which indicated that he did not believe he would be executed. (P.C. tr. 857, 870-71). Dr. Parwatikar found that Wilkins suffers from a mental disorder which impaired his reasoning, rendering him "not competent to waive his Constitutional Rights and represent himself in front of the court." (Ex. P-13, p. 16). Dr. Parwatikar explained that Wilkins lacked "both a rational and factual understanding of the proceedings, and rational and factual decision making." (D.C. tr. 20). "Heeding Dr. Parwatikar's determination, the Supreme Court of Missouri set aside its prior proceedings and appointed counsel to represent Wilkins despite his protestations." Wilkins v. Bowersox, 145 F.3d 1006, 1010 (8th Cir. 1998). A divided Missouri Supreme Court, against Wilkins' wishes, appointed the public defender to represent

him, and affirmed the sentence without referring to Dr. Parwatikar's findings. State v. Wilkins, 736 S.W.2d 409 (Mo. 1987).

On June 30, 1988, Wilkins moved to set aside his conviction and sentence. (Post Conviction Legal File, hereafter P.C. L.F., 1). Dr. Dorothy Lewis, professor of psychiatry at the New York University School of Medicine, testified at a hearing on the motion that she observed symptoms of serious mental illness which were corroborated in Wilkins' records. (P.C. tr. 24-26). Wilkins' "paranoid orientation . . . played a major role in his dismissing his attorney." (P.C. tr. 27). She also found that he "was an adolescent and he did not have the judgment, the experience, whatever of an adult, but in his case far more important is the fact that he was illogical and ...couldn't really put together a case for himself. He was confused at times." (Id. at 28). She quoted passages from the sentencing transcript indicating Wilkins' confused and disordered thinking. (P.C. tr. 41-47).

Dr. William A. O'Connor, psychologist, "testified that Wilkins' guilty plea was not a voluntary and intelligent decision, but rather an emotionally-driven decision that was the product of his mental disorder." 145 F.3d at 1010. Dr. Logan explained his doubts about Wilkins' competence, and testified that Wilkins waived counsel without adequate factual knowledge of his legal options:

> Mr. Wilkins did not know anything about the appeal process or any of the subsequent offers he might've had at the beginning. . . as a suicidal person does, he did not look down the road to consider that he might view things more differently at another point in time and that he might choose to change his mind.

(P.C. tr. 497). Dr. Logan explained that "when he's emotionally aroused, he cannot use his cognitive abilities in a way that would help him reason and weigh risks and benefits of decisions." (D.C. tr. 35-36). Although there were some minor differences among the experts

as to Wilkins' diagnosis, Dr. Logan believed that "all the various individuals are coming down on the same side regardless of diagnosis. I think we all think he's severely disturbed." (P.C. tr. 511). Dr. Logan had warned Mr. Duchardt that eventually Wilkins would change his mind about his plea. (P.C. tr. 512).

The court of appeals summed up the state's case at the postconviction hearing:

> In response, the state called Mr. Duchardt and Dr. Mandracchia to testify. Mr. Duchardt stated he did not believe that any of Wilkins' decisions were made knowingly, intelligently, and voluntarily. He had consistently and forcefully made the same point in the trial court's proceedings. Dr. Mandracchia explained that his initial 95-minute examination was not designed to address the issue of whether Wilkins' waiver of counsel and guilty plea were knowing, intelligent, and voluntary. The postconviction court thus ordered Dr. Mandracchia to perform an additional evaluation of Wilkins that would be directed at these issues. After conducting clinical interviews lasting over seven hours, Dr. Mandracchia concluded that Wilkins' waiver of counsel, guilty plea, and waiver of offering mitigating evidence were made knowingly, but these decisions were not made voluntarily or intelligently. The postconviction court simply rejected the uncontroverted evidence as "unpersuasive."

145 F.3d at 1010. The Missouri Supreme Court affirmed, holding that the court was free to disregard *all* of the uncontradicted testimony of the experts who testified that Wilkins' waiver was not knowing, voluntary and intelligent. Wilkins v. State, 802 S.W.2d 491 (Mo.) (en banc), cert. denied, 502 U.S. 841 (1991).

Respondent filed a petition for writ of habeas corpus in the U.S. District Court, Western District of Missouri, raising the constitutional violations on which the courts below granted relief. The district court conducted a hearing in January, 1996. The court observed during Mr. Duchardt's testimony:

> Q. (by the court) Well, in this case there were red flags all over the place.
> A. (by Mr. Duchardt) I thought so, Judge.

Q. You had a 16-year-old boy, disturbed past, wanting the death penalty. I mean, the floor was covered with red flags. Right?
A. That's what I thought.
Q. And a matter of fact, you had said something about you didn't think he was competent.
A. Yes, sir.
Q. And then told the Judge that.
A. That's correct, sir.
Q. And then he goes through the same litany you go through with a bank robber that had been in prison eight or ten times.

(D.C. tr. 115-16). The district court on May 16, 1996, entered its order conditionally granting Wilkins' petition for writ of habeas corpus, ordering that the writ would become absolute if Missouri did not allow Wilkins to withdraw his plea within sixty days. (J.A. 1194-1281). The court of appeals affirmed.

Petitioner sought a stay of the mandate from the court of appeals for purposes of petitioning this Court for a writ of certiorari. (Supp. App. 4). That motion was denied September 1, 1998. (Id. 5). On October 30, 1998, the Clay County Circuit Court entered its order sustaining Wilkins' motion to withdraw his pleas of guilty, and Wilkins entered pleas of not guilty to all charges.

REASONS FOR DENYING THE WRIT

I. THE CASE IS MOOT.

Respondent on October 27, 1998, moved in the Circuit Court of Clay County, Missouri, to withdraw his pleas of guilty. The motion relied on the mandate of the court below and state law, alleging that "Failure to allow defendant to set aside his pleas would result in a manifest injustice. State v. Arnold, 419 S.W.2d 59 (Mo. 1967); State v. Blaylock, 394 S.W.2d 364 (Mo. 1965); State ex rel City of Kansas City v. Meyer, 513 S.W.2d 414 (Mo. 1974)." (Supp. App., pp. 1-2). The Clay County Circuit Court on October 30, 1998, sustained respondent's motion to withdraw his plea, ordering that "guilty pleas in all three causes be

set aside and held for naught." (Respondent's supplemental appendix, pp. 4-6).[5] On that same day Respondent entered pleas of not-guilty. (Id.).

Although petitioner sought a stay of the mandate of the Eighth Circuit, that motion was denied on September 1, 1998. No stay of the mandate was sought in this Court, and the Clay County Prosecuting Attorney stipulated to the entry of an order setting aside respondent's pleas of guilty.

The final order of the state court setting aside respondent's plea presents this Court with two significant obstacles to exercising jurisdiction. First, the issue which petitioner wants this Court to address is moot. Second, the motion to withdraw respondent's plea was based in part on state law grounds.

"Federal courts are without power to decide questions that cannot affect the rights of the litigants in this case before them." DeFunis v. Odegaard, 416 U.S. 312 (1974).[6] This principle applies with equal force where a state prisoner receives relief from his conviction

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[5]Although the state might have filed an interlocutory appeal of Judge Russell's order under Missouri Revised Statute § 547.200.2, no such appeal was filed. The five-day period within which to file a notice of appeal has expired, and the order of the Clay County Circuit Court is final. § 547.200.4.

[6]This Court decided that the case was moot, stating:

> In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it.

416 U.S. at 317. Similarly, the Circuit Court of Clay County, Missouri, has issued a final order permitting respondent to withdraw his plea, and returned the case to the active trial docket.

and sentence from a state court before his habeas petition reaches this Court; such a case is moot:

> 'The purpose of the proceeding defined by the statute [authorizing the writ of habeas corpus to be issued] was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail.' *McNally v. Hill*, 293 U.S. 131, 136. 'Without restraint of liberty, the writ will not issue. *Id.*, 293 U.S. 138. See also *Johnson v. Hoy*, 227 U.S. 245. 'It is well settled that this court will not proceed to adjudication where there is no subject-matter on which the judgment of the court can operate.' *Ex parte Baez*, 177 U.S. 378, 390. We have applied these principles to deny the writ of certiorari for mootness on the express ground that petitioner was no longer in respondent's custody in at least three cases not relevantly different from this one. *Weber v. Squire*, 315 U.S. 810; *Tornello v. Hudspeth*, 318 U.S. 792; *Zimmerman v. Walker*, 319 U.S. 744.

Parker v. Ellis, 362 U.S. 574, 575-76 (1960).[7] In one of the cases cited by this Court, Weber v. Squire, the petitioner was released after the district court had issued the writ, which rendered the case moot. (See 362 U.S. at 588 (Harlan, J., dissenting)). Similarly, Wilkins is no longer in the custody of Michael Bowersox. The conviction which was the subject of Wilkins' petition for writ of habeas corpus has been set aside by the Missouri trial court. He is a pretrial detainee in the Clay County Detention Center, 11 South Water, Liberty, Missouri.

A second obstacle to jurisdiction is that respondent's motion to withdraw his guilty pleas, which was sustained by the Clay County Circuit Court, was based in part on state law grounds articulated in Missouri Rule 29.11. That rule allows the withdrawal of a guilty plea

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[7]Although this Court has overruled Parker's holding that a prisoner's release on parole renders his habeas petition moot, Carafas v. La Vallee, 391 U.S. 234 (1968), this Court did so because the prisoner continues to suffer "collateral consequences" of his conviction. Id. at 237-38. This case is different because respondent prevailed in the court below, the state has fully complied with the judgment issuing the writ, and respondent is no longer suffering any collateral consequences of the judgment.

which is not knowing, voluntary and intelligent. Therefore, the state court judgment rests on independent, adequate state grounds. Michigan v. Long, 463 U.S. 1032 (1983). The petition should be dismissed.

II. THE COURT BELOW GRANTED RELIEF NOT BECAUSE OF A HYPOTHETICAL FAILURE BY THE STATE TRIAL JUDGE TO MEET SOME "MECHANICAL FORMULA," BUT BECAUSE THE TOTALITY OF THE CIRCUMSTANCES ESTABLISHED THAT THE MENTALLY ILL JUVENILE OFFENDER'S WAIVER OF COUNSEL AND PRO SE PLEA OF GUILTY IN THIS CAPITAL CASE WERE NOT KNOWING, VOLUNTARY AND INTELLIGENT.

Heath Wilkins is the youngest person to be sentenced to die for murder in the state of Missouri in over a hundred years. (J.A. 1023). This distinction was not the product of an adversarial proceeding in which he was found to be the most heinous teenager of the century. To the contrary, Wilkins was a homeless, psychiatrically ill child with a disturbing history of abuse and neglect when he was permitted to waive his right to counsel and plead guilty to a capital crime. In accepting and affirming Wilkins' waiver of counsel, Missouri courts ignored many warnings that he was not acting voluntarily and intelligently, including the unanimous testimony of every single mental health expert and Wilkins' experienced court-appointed counsel.

Petitioner mischaracterizes the decisions of the courts below in an attempt either to manufacture a conflict between the circuits that does not exist or to thrust this case into a conflict of which it clearly is not a part. The lower courts' detailed discussions of the facts of this unique and troubling case, woven throughout their opinions, belie petitioner's claim that they applied a "mechanical formula" or mandated a "rigid checklist" for assessing the validity of Wilkins' waivers and pleas. (Petition, p. 19). The court of appeals, using the very

standard urged by the petitioner in its brief in that court,[8] explicitly "consider[ed] the defendant's waiver in light of the totality of the circumstances, 'including the background, experience, and conduct of the accused.'" 145 F.3d at 1011. The opinions themselves reflect a conscientious examination of all the circumstances surrounding respondent's decisions.

The amount of time the lower courts devoted to examining the facts of the case indicate anything but a resort to a mechanical formula to determine the validity of Wilkins' decisions. In addition to what was said and what was not said during the proceedings, the federal courts examined the context of the discussions--lay and expert evidence of Wilkins' thought processes, what he knew and what he didn't know, his purpose in pursuing his waiver and plea, his youth, isolation, psychiatric illness, lack of education, and lack of understanding of the charges--in reaching the decision that "[t]he uncontroverted *record as a whole* throughout the state proceedings indicates that Wilkins' waiver of counsel was not knowing, intelligent, and voluntary." 145 F.3d at 1013. (emphasis added).

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[8]Petitioner advocated that the court of appeals should use the very standard that he now complains about, arguing: "[t]he purpose of the 'knowing and voluntary' inquiry. . .is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." Id., at 2687 n.12 (emphasis in original). Pertaining to the latter inquiry

> such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a pleas is tendered.

VonMoltke v. Gillies, 68 S.Ct. 316, 323 (1948). (Pet. br. at 22).

In sharp contrast to the Missouri courts, the district court and the court of appeals meticulously examined all the facts and circumstances in the case. Virtually every factor relating to the validity of a defendant's waiver of his constitutional rights weighed against accepting Wilkins' pro se guilty pleas.[9] In fact, the federal courts found fault in the Missouri courts' failure to address and resolve many of the factual issues necessary to properly apply the totality of the circumstances test petitioner advocates:

> After an exhaustive review of the entire file, this Court found that many disputed factual issues were not settled and some findings by the state courts were perplexing. The state record contains ambiguous or contradictory support for certain findings and conclusions, particularly those related to the claims challenging the waiver of counsel and guilty plea.

Wilkins v. Bowersox, 933 F. Supp. 1496, 1504-05 (W.D.Mo. 1996). The court of appeals likewise found the Missouri courts' decision constitutionally deficient because it simply ignored facts which were critical to the validity of Wilkins' waiver and plea in the totality of the documents.[10] Both courts below noted many facts in the state court record that are difficult, if not impossible, to reconcile with a valid waiver and plea. These include persistent warnings from defense counsel, mental health experts, and the state courts' own observations which should have alerted them that Wilkins was not acting voluntarily nor intelligently. Examination

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[9]Hence the resort by the Missouri Supreme Court to a rule that the trial court could properly disregard *all* of the evidence in affirming Wilkins' plea and sentence. Wilkins v. State, 802 S.W.2d 491, 501 (Mo.) (en banc), cert. denied, 502 U.S. 841 (1991).

[10] "[T]he [Missouri Supreme Court took no account of Wilkins' upbringing." 145 F.3d at 1012. "The state court made no fact-findings to indicate why it was unpersuaded by the unanimous testimony presented at the postconviction hearing, and the record simply does not support the state court's conclusion that Wilkins knowingly, intelligently, and voluntarily waived his right to counsel." Id. at 1014. "Neither state court considered petitioner's background or the unanimous opinion of all mental health professionals that the waiver was not intelligent and voluntary." 933 F. Supp. at 1515.

of the lower courts' decisions exposes the fallacy of petitioner's ludicrous accusation that they failed to consider the totality of circumstances.

1. Unlike the state courts, the courts below appropriately considered Wilkins' experienced defense attorney's repeated warnings that his client's waiver and plea were not knowing, voluntary and intelligent.

Mr. Fred Duchardt, "a seasoned defense lawyer," 933 F. Supp. at 1517, repeatedly warned the court that his client was not making rational decisions. Before Wilkins' attempted to waive counsel,

> Mr. Duchardt insisted that there was "considerable question" about petitioner's competency. Over Mr. Duchardt's protests, the court found him competent to proceed. Counsel again reiterated his belief that petitioner was not acting competently.

933 F. Supp. at 1502. It was clear to the court of appeals that Mr. Duchardt "did not believe that any of Wilkins' decisions were made knowingly, intelligently, and voluntarily," and he "consistently and forcefully made the same point in the trial court's proceedings." 145 F.3d at 1010. The court further observed that

> While Mr. Duchardt indicated to the court that he had attempted to explain all of the available options to Wilkins . . . , he testified that he never discussed lesser included offenses or ranges of punishment with Wilkins and that Wilkins did not give him an opportunity to explain all of his potential options.

145 F.3d at 1012.[11]

Wilkins' understanding of the mental element of first degree murder under Missouri law is an important consideration in this case "because there is much evidence to suggest

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[11]Upon receiving Dr. Mandracchia's report, Duchardt went to the Clay County Jail to visit Wilkins, intending to "begin, in earnest, preparation for Heath's defense." (Transcript of District Court hearing, hereafter "D.C. tr." 91). At that time, Wilkins told Duchardt that he wished to be put to death. (Ex. P-21, D.C. tr. 92). The court below found Duchardt's testimony that a discussion of possible defenses "never took place" to be clear and convincing. (J.A. 1236).

that, due to his mental disorders, he may not have been capable of deliberation," the mental state for first degree murder under Missouri law. 933 F. Supp. at 1517. Mr. Duchardt had "described this case as a very defensible one on this issue of mental state. Indeed, all of petitioner's co-defendants entered pleas of guilty to lesser offenses and received parole-eligible sentences." Id.[12]

The district court found Duchardt's testimony "to be clear and convincing that petitioner's waiver of counsel and plea of guilty were made without an adequate understanding of the charges against him and the available defenses." 933 F. Supp. at 1517. The district court was properly concerned that the Missouri courts completely ignored Duchardt's testimony:

> Mr. Duchardt's testimony was apparently overlooked by the state courts. When asked at the postconviction hearing whether he viewed Mr. Wilkins' decision to dismiss counsel, plead guilty and seek the death penalty as a decision made after "an intelligent weighing of the alternatives", Mr. Duchardt replied: "I never have and I never will."

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[12]Petitioner engages in hyperbole when he claims that the court below requires all defendants to be advised of the full range of punishment for all lesser offenses. The court merely noted that such knowledge was crucial *in this case* in light of Wilkins' statements at sentencing, when the trial court asked him for the very first time why he wanted to be put to death. Wilkins replied,

> DEFENDANT: I'm, I'm telling you, you know, I never stated flat out that I want the death penalty.
> THE COURT: Okay.
> DEFENDANT: I stated that I would prefer the death penalty over spending life in prison, you know.

(J.A. 791). The court on several occasions had advised Wilkins that the only possible outcomes of a trial would be acquittal, life without the possibility of parole, or death.

Id., n. 19. Although the state courts refused to acknowledge Duchardt's probative warnings and testimony, the federal courts appropriately considered them in its analysis of the totality of the circumstances.

2. **Unlike the state courts, the courts below appropriately considered the testimony of mental health experts, including state-employed examiners Dr. Steve Mandracchia and Dr. Sam Parwatikar, that Wilkins' was mentally disturbed, and did not act knowingly, voluntarily and intelligently.**

Wilkins' impaired mental and emotional condition is another piece of the totality of circumstances given mindful consideration by the courts below. Before trial, Wilkins was examined by state psychologist Steve Mandracchia, who found him competent, and testified accordingly at a hearing. Mr. Duchardt arranged a second evaluation by Dr. William Logan, a psychiatrist with the Menninger Clinic. Dr. Logan expressed reservations about Wilkins' competence, and cautioned the court that his mental and emotion disturbance could interfere with his ability to make appropriate decisions:

> As early as the first competency hearing, Dr. Logan testified to the numerous mental and emotional problems that interfered with Wilkins' "decision making process at certain critical points." . . . Dr. Logan described Wilkins as "a very impulsive individual who really doesn't think through the consequences of some of his decisions." Dr. Logan also indicated that Wilkins' upbringing was devoid of "supervision or tutoring or guidance in terms of how to use his mind to make rational common sense decisions."

145 F.3d at 1013-14. The trial judge ruled from the bench that Wilkins was competent, and over Mr. Duchardt's relentless protests, accepted Wilkins' waiver of counsel. Pursuant to Wilkins' pro se plea, the court sentenced him to death.[13]

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[13]The court of appeals found that

> The state trial court erroneously believed that its previous finding that Wilkins was competent to stand trial was alone sufficient to

On review of his death sentence in the Missouri Supreme Court, Wilkins repeated his desire to be put to death. The court appointed Dr. Sam Parwatikar to examine Wilkins to determine his "competence" to waive counsel. Dr. Parwatikar reported that Wilkins was not capable of waiving his right to counsel, 145 F.3d at 1010, and that Wilkins' mental disorders and upbringing were significant factors which rendered him unable to waive counsel. 145 F.3d at 1014. On Dr. Parwatikar's recommendation, "the Supreme Court of Missouri most tellingly refused to permit Wilkins to proceed pro se; it appointed counsel to represent Wilkins on direct review, despite Wilkins' persistent and professed desire to waive counsel at its proceeding as well." Id. The district court interpreted this action as "a finding in accord with Dr. Parwatikar's report: that the waiver of counsel was not intelligent and voluntary." 933 F. Supp. at 1512, citing Parker v. Dugger, 498 U.S. 308, 316 (1991). In spite of this finding, the Missouri Supreme Court affirmed Wilkins sentence.

While his appeal was pending, Wilkins had a change of heart and filed a motion asking to set aside his guilty pleas. Several mental health examiners testified in support of his motion. The court below briefly summarized that testimony:

> mandate a conclusion that Wilkins' waiver of counsel was valid. (See J.A. at 650.) We believe this legal error also invaded the direct review proceedings in the Supreme Court of Missouri. See Wilkins, 736 S.W.2d at 415 (holding that "a finding of competency necessarily entails the ability to waive certain rights"). It also permeated the postconviction court's conclusion. (Resp. Ex. G, at 92 ("The court concludes that the finding of competency of movant to proceed entailed the ability to waive certain rights and to make [the] decision to enter [a] plea of guilty and under the circumstances of this case to waive counsel and proceed pro se."))

145 F.3d at 1013.

> Dr. Dorothy Lewis, a professor of psychiatry at the New York University School of Medicine, explained that Wilkins' paranoia motivated his decision to waive counsel and that his thought processes were confused and illogical throughout the former proceedings. . . . Dr. William O'Connor, a psychologist, testified that Wilkins' guilty plea was not a voluntary and intelligent decision, but rather an emotionally-driven decision that was the product of his mental disorder. . . Dr. Logan also testified and agreed with Dr. Parwatikar's earlier conclusion that Wilkins was not "competent" to proceed as his own attorney, even though Dr. Logan was previously ambivalent regarding Wilkins' competence to stand trial. Dr. Logan also believed that Wilkins' waiver of counsel was an emotionally-charged impulsive decision. ([*Wilkins v. State*], 802 S.W.2d at 494.)

145 F.3d at 1010. The state called Dr. Mandracchia to rebut this evidence. However, "Dr. Mandracchia explained that his initial 95-minute examination was not designed to address the issue of whether Wilkins' waiver of counsel and guilty plea were knowing, intelligent, and voluntary." Id. On the state's motion, the court ordered Dr. Mandracchia to conduct another evaluation to determine whether Wilkins' waiver of counsel and plea of guilty were knowing, voluntary and intelligent. Dr. Mandracchia

> indicate[d] that Wilkins did not understand his legal alternatives. Dr. Mandracchia stated that Wilkins "would not, and functionally, could not, meaningfully entertain possibilities such as acquittal, insanity defense, conviction of a lesser included offense, mitigating circumstances, parole following a period of incarceration, etc."

145 F.3d at 1015-16. The district court observed that "Dr. Mandracchia further explained . . . that petitioner's reasoning in making the decision was seriously defective, that he did not consider alternative options and did not reach his decision in a logical fashion." 933 F. Supp. at 1514. The courts below repeatedly pointed out that the lay and expert testimony on the issue of whether Wilkins had made knowing, voluntary and intelligent decisions was "uncontroverted" and "unanimous." See, 145 F.3d at 1010, 1012, 1014; 933 F. Supp. at

1015. The court of appeals acknowledged that "the mental health of a defendant is also a relevant consideration in assessing whether a waiver of counsel was knowing, intelligent, and voluntary." 145 F.3d at 1012.

Like the state courts, petitioner simply ignores this extremely significant circumstance surrounding Wilkins' waiver of counsel and plea of guilty. "The postconviction court simply rejected the uncontroverted evidence as "unpersuasive." 145 F.3d at 1010. The Missouri court "made no fact-findings to indicate why it was unpersuaded by the unanimous testimony presented at the postconviction hearing." Id. at 1014. The district court found that "[i]t is puzzling and inexplicable why the state court did not make any findings or address whether petitioner's disturbing background of mental serious disorders had any bearing on his waiver of counsel and guilty plea." 933 F. Supp. at 1513. Furthermore, the district court observed that "[n]either state court considered petitioner's background or the unanimous opinion of all mental health professionals that the waiver was not intelligent and voluntary." Id. at 1515.

In fact, by ignoring the compelling evidence in the record about the background, ability and thinking process of the defendant, the Missouri courts in effect accepted a simple, mechanical litany of "yes/no" questions to suffice in finding a valid waiver instead of looking at the totality of the circumstances. Thus, it was the decisions of the Missouri courts that exemplify the "mechanical formula" or "checklist" approach so strongly condemned by petitioner, not those of the federal court. Rather, it was the federal courts who properly understood and applied the totality of circumstances approach adopted by this Court and who rejected the mechanical or rigid formula followed by the state courts.

3. Unlike the state courts, the courts below appropriately considered Wilkins' isolation, youth, and his history of abuse and neglect in determining whether his waiver of counsel and plea of guilty were knowing, voluntary and intelligent.

The court of appeals correctly observed that "[i]n the waiver of counsel context, . . . a defendant's background and personal characteristics are highly relevant in determining the validity of such a waiver." 145 F.3d at 1012. That consideration is particularly compelling in Wilkins' case:

> In the present case, while the state trial court briefly addressed Wilkins' youth and limited educational background . . . , the court took no account of Wilkins' upbringing. The record is uncontroverted that Wilkins was severely abused as a child by his mother and her boyfriends, that he had a history of drug abuse, and that by the age of 10, he had been in and out of mental health facilities and had been described as having demonstrated homicidal and suicidal tendencies.

145 F.3d at 1012-13. Even though Wilkins' was isolated and had no adult guidance, the state court gave no significance to that fact:

> The record also shows that petitioner did not talk to anyone else about the decision to waive counsel. When the trial judge asked petitioner if he had consulted with anyone about that, Mr. Wilkins replied "There's nobody else, nobody else who has a hand in my decision, your honor."

The district court referred to Dr. Logan's testimony to explain the relevance of such circumstances:

> Dr. Logan testified at the state evidentiary hearing that petitioner's lifetime without affection and nurturance had caused a "profound developmental arrest", severe mental disturbances and that he had attempted suicide several times. . . . Dr. Logan affirmed at this Court's hearing that petitioner was extremely disturbed and immature at age sixteen. His opinion is that petitioner did not voluntarily or intelligently waive his right to counsel and that he was strongly affected by "internal coercion".

933 F.3d at 1513. Dr. Lewis stated that Wilkins' "paranoid orientation . . . played a major role in his dismissing his attorney." Id. "Dr. Parwatikar further noted that [Wilkins'] mental

disorders made him less capable than other sixteen year old boys in making intelligent and voluntary decisions." 145 F.3d at 1512, n. 13.

A peculiar circumstance is the failure of Missouri courts to respond to the fact that Wilkins was abused by a jail guard on his way to court to plead guilty:

> [T]he trial court's only inquiry into "voluntariness" during the guilty plea was a question whether petitioner had received any promises or threats . . . But when petitioner reported that a guard had assaulted him that day, the court dismissed it without delving into the circumstances or effect of the incident.
>
> * * * *
>
> The assaulting officer remained in the courtroom throughout the plea and there were no further questions. Although the trial court did not explore this further, Dr. Logan testified that the incident would have intensified petitioner's decision to plead guilty by confirming that the future was hopeless with potential for further abuse.

933 F. Supp. at 1518. This was yet another circumstance weighing against the validity of Wilkins' waiver and plea, ignored by the state courts, but given appropriate consideration in the courts below. And again, this is yet another circumstance demonstrating that the courts below did not require a mechanistic formula but instead engaged in a conscientious consideration of the totality of the circumstances.

4. The courts below appropriately considered the record of the state competency, waiver of counsel, plea, sentencing and postconviction hearings, in addition to the totality of the circumstances, in finding that Wilkins' plea of guilty and waiver of counsel were not knowing, voluntary and intelligent.

Petitioner's complaint that the lower courts' concern about Wilkins ignorance of lesser offenses constitutes an unreasonable demand of "procedural exactitude" is absurd. The assertion that the court of appeals has mandated a new script for all plea hearings is nothing more than alarmist rhetoric. The opinions below are in perfect harmony with United States v. Broce, 488 U.S. 563 (1989), and McCarthy v. United States, 394 U.S. 459 (1969).

(Petition, p. 26). The courts below merely insist that a defendant understand the charges against him when waiving counsel or pleading guilty; the record in this case reflects that Wilkins did not.

Wilkins was charged with murder in the first degree, which requires a very high culpable mental state:

> Mo. Rev. Stat. § 565.020 (1984) provides that a person commits the crimes of murder in the first degree if he "knowingly causes the death of another person after deliberation on the matter." The only possible punishments are death and life in prison without the possibility of parole. Mo. Rev. Stat. sec. 565.032. Second degree murder, which carries a parolable sentence, does not include "deliberation". sec. 565.021; *State v. Jackson*, 511 S.W.2d 771 (Mo. 1974). Under Missouri law, deliberation means that the defendant acted after reflection, "in a cool frame of mind." *State v. Shaw*, 569 S.W.2d 375, 377 (Mo. App. 1978). If premeditation and malice are shown, but not deliberation, the offense is murder in the second degree. *State v. Ayers*, 470 S.W.2d 534 (Mo. 1971).

933 F. Supp. at 1516. The sentencing court never determined whether Wilkins' understood the elements of the charge. The uncontroverted evidence proves he did not.

This deficiency in the record is significant. The district court explained:

> It was particularly important for petitioner to understand the option of a second degree murder conviction because there is much evidence to suggest that, due to his mental disorders, he may not have been capable of deliberation. Although Dr. Logan found that petitioner would be competent to assist an attorney at trial, he testified that petitioner could not deliberate. . . . Mr. Duchardt, a seasoned defense lawyer, described this case as a very defensible one on this issue of mental state. Indeed, all of petitioner's co-defendants entered pleas of guilty to lesser offenses and received parole-eligible sentences.

Id. at 1517. In spite of the pivotal role that the mental element of the offense would play at a trial of Wilkins' case, the state court never discussed it with him. The district court found:

> The record here does not show that Petitioner understood the mental element of the crime charged or the defenses he would relinquish by pleading guilty. *The word "deliberation" or its legal equivalent was never used when he entered his guilty plea.* . . . The only words used in relation to mental states were "premeditated" and "knowingly" -- terms that describe the mental state for second degree murder under Missouri law. . . . Yet Mr. Wilkins entered a plea of guilty to first degree murder.
>
> Moreover, the trial court expressly told Mr. Wilkins that there were only two potential punishment options: the death penalty and life in prison without parole. . . . The record does not establish that petitioner knew, or was ever told, that at a trial, an attorney could present a "diminished responsibility" defense that might result in a conviction on the lesser included offense of second degree murder and receive a parolable sentence.

933 F. Supp. 1516-17. (emphasis added).

The court of appeals agreed that the state courts did not determine whether Wilkins understood the charge, stating, "*Given the combination of Wilkins' young age and the record evidence of his severely troubled childhood*, the state trial court's colloquy with Wilkins was far from the kind of in-depth inquiry that is necessary to ensure a valid waiver of counsel." 145 F.3d at 1013 (emphasis added). The court further agreed that "[t]he record reveals that at no time did the state court explain to Wilkins his possible defenses to the charges against him, nor did the court inform him of lesser included offenses or the full range of punishments that he might receive." Id. at 1012. Contrary to petitioner's claim, these statements do not establish that the court held that a trial judge must, in all cases, in all circumstances, explain in painstaking detail all elements of the charges and defenses possible. Rather, they confirm that in this case, consideration of the judge's advice to defendant was necessary to the validity of the plea in the totality of the circumstances:

> Moreover, the record does not establish that Wilkins possessed the required "understanding of the law in relation to the facts." McCarthy, 394 U.S. at 466. . . . [T]he state court did

> not discuss possible defenses such as diminished capacity; the court failed to inform Wilkins of possible lesser included offenses such as second degree murder and manslaughter; and the court did not explain the full range of potential sentences that Wilkins could receive. The court limited its discussion of sentences to the death penalty and life imprisonment without parole. . . . The court's omission of other potential sentences is quite significant in light of Wilkins' statement to the court that he did not absolutely wish for the death penalty but merely preferred it over spending the rest of his life in prison. . . . Additional reports from Dr. Mandracchia indicate that Wilkins did not understand his legal alternatives.

145 F.3d at 1015-16. Wilkins' sense of hopelessness arose in part from the admonition he received repeatedly from the trial court that his sole punishment options were "the death penalty or life imprisonment without probation or parole or release except by act of the governor." (J.A. 788). When the sentencing court finally asked Wilkins why he wanted to die, Wilkins replied, "I'm telling you, . . . I never stated flat out that I want the death penalty . . . . I stated that I would prefer the death penalty over spending life in prison. . ." (J.A. 791).

Both cursory and careful readings of the decisions of the district court and the court of appeals confirm that each court considered the statements and the actions of the state trial judge in the totality of circumstances. Nowhere in their opinions did they purport to impose blanket requirements on trial judges to say or do anything in particular in order to render a waiver of counsel or a guilty plea voluntary. Petitioner's suggestions to the contrary simply do not survive scrutiny.

CONCLUSION

The courts below painstakingly applied the appropriate legal standard in determining whether a homeless teenager with a history of abuse, neglect and psychiatric disorders acted knowingly, intelligently and voluntarily when he waived his right to counsel and pled guilty to a capital charge. Surprisingly, the Missouri courts--like petitioner--did not make a single

reference to any of well-documented and unrefuted information, despite their purported commitment to a totality of circumstances test. Petitioner does not challenge the district court's thorough discussion of the uncontroverted facts in the state court record, as well as the contradictory and inconsistent findings of the state court, because to do so would admit the obvious--that the court of appeals and the district court did not utilize mechanistic and rigid formulae, but instead examined the totality of the circumstances in reaching the inescapable conclusion that Wilkins' waiver of counsel and plea of guilty were not knowing, voluntary and intelligent.

As the arguments above plainly demonstrate, the federal courts' proper application of the totality of the circumstances test to the unique and troubling facts of this case poses no cert-worthy issue. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was forwarded by regular United States mail, postage prepaid, to:

Cassandra Dolgin
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102

on this 30th day of November, 1998.

Counsel for Respondent

No. 98-674

IN THE UNITED STATES SUPREME COURT

October 1998 Term

This is a Capital Case

HEATH WILKINS,

Respondent,

vs.

MICHAEL BOWERSOX,

Petitioner.

APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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Counsel for Respondent

TABLE OF CONTENTS

Page

Defendant's Motion to Withdraw Guilty Pleas 1

Clay County Circuit Court Docket Sheets 4

Appellant's Motion to Stay Issuance of the Mandate 7

Court of Appeals Order 10

FILED
OCT 28 1998
TIME:
Clay County Circuit Court

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	Division 2
	)	
vs.	)	Case No. CR185-491FX and CR185-492FX
	)	
HEATH A. WILKINS,	)	
	)	
Defendant.	)	

MOTION TO WITHDRAW GUILTY PLEA

COMES NOW defendant Heath A. Wilkins, by counsel, and moves this Court pursuant to Missouri Rule 29.07D, the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and the mandate of the Eighth Circuit Court of Appeals in Wilkins v. Bowersox, No. 96-2441 (8th Circuit September 1, 1998), to grant defendant leave to withdraw his pleas of guilty entered in these matters on May 9, 1986. For his motion, defendant states:

1. Defendant on May 9, 1986 plead guilty in this Court to the offense of armed criminal action, CR185-492FX, and murder in the first degree, CR185-491FX, and was sentenced to life imprisonment and death, respectively. In a third case, CR185-490FX, defendant plead guilty to the offense of carrying a concealed weapon and was sentenced to five years, which sentence has been fully served. Defendant does not seek leave to withdraw his plea on this offense.

2. Defendant's pleas of guilty in the above-referenced cases were entered subsequent to a waiver of counsel, which was not knowingly, voluntarily and intelligently made. See Wilkins v.

Bowersox, No. 91-0861-CV-W-5 (W.D. Mo. May 15, 1996), affirmed, Wilkins v. Bowersox, No. 96-2441 (8th Circuit filed June 8, 1998).

3. In a federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254, the United States District Court for the Western District of Missouri on May 15, 1996, conditionally granted the petition for writ of habeas corpus, and provided that the conditional writ "shall become unconditional and permanent unless the State of Missouri allows petitioner to withdraw his pleas of guilty and commences proceedings to afford petitioner a trial within sixty days of the date of this order." A true and correct of said judgment is attached hereto.

4. On motion of the State of Missouri, the aforementioned judgment granting the petition for writ of habeas corpus was stayed by the United States District Court on July 2, 1998, pending the state's appeal to the United States Eighth Circuit Court of Appeals. A copy of said order is attached hereto.

5. The Eighth Circuit Court of Appeals on June 8, 1998, affirmed the judgment of the district court. The state's motion to stay the mandate of the Eighth Circuit of Appeals was denied, and the court's mandate was issued, on September 1, 1998.

6. Defendant was unrepresented by counsel when he entered his pleas of guilty to the above-referenced charges. Furthermore, defendant lacked a rational understanding of the charges against him, potential defenses, and his legal rights with respect to his defense at the time of his pleas and convictions on the above-referenced charges.

7. Failure to allow defendant to set aside his pleas would result in a manifest injustice. State v. Arnold, 419 S.W.2d 59 (Mo. 1967); State v. Blaylock, 394 S.W.2d 364 (Mo. 1965); State ex rel City of Kansas City v. Meyer, 513 S.W.2d 414 (Mo. 1974). Furthermore, an order allowing defendant to withdraw his pleas is necessary to comply with the mandate of the Eighth Circuit Court of Appeals.

WHEREFORE, defendant respectfully moves this Court to enter its order permitting him to withdraw his pleas of guilty to the above-referenced charges, and for such further relief as the Court deems appropriate.

Respectfully submitted,

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CYNTHIA L. SHORT, #36836
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Kansas City, MO 64106
816/889-2059 FAX 816/ 889-2001

Counsel for Defendant

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, on the 27th day of October, 1998, to Mr. Timothy Finnical, Clay County Prosecutor Office, 11 S. Water, Liberty, Missouri 64068.

Sean D. O'Brien

DOCKET SHEET

Circuit Court, Clay County, Missouri

File No. CR185-490FX

Nature of Action:	State of Missouri Plaintiff/Petitioner	John Newberry Dan White Att. for Plaintiff or Petitioner
	vs.	
	PD Heath Wilkins aka Pyzon Defendant/Respondent	Cynthia Short Sean O'Brien Att. for Defendant or Respondent

Date	Orders of Court
JUN 27 1986	Comes now state by ~~att~~ prosecuting attorney and defendant ~~in~~ person and ~~by attorney~~ _____. Punishment assessed against defendant at [illegible] ~~in the Clay County Jail~~ in the Missouri Department of Corrections and Human Resources. Allocution, sentence and judgment accordingly. Judgement entered against defendant and in favor of the State of Missouri in the amount of $26.00 for the Crime Victims ~~Compensation Fund.~~ [illegible] PO notified
Oct. 15 87	Mandate from Supreme Court of Missouri filed affirming judgment and sentence. ph
Oct 30 1998	Comes defendant in person & with attys. O'Brien & Short and State by assistant pros. White. Court makes record on defendant's motion to set aside guilty pleas of defendant in case No. CR 185-490, CR 185-491, & CR 185-492. Court Orders guilty pleas in all three casues set aside & held for naught. Defendant waives reading of charge and enters plea of not guilty in all 3 causes of action. Defendant files in open Court motion for discovery & delivers copy to State. Court orders parties to file all notices & pre-trial motions on or before 12/18/98. Court orders parties to appear for scheduling conference on 12/21/1998 at 9:00 am. DWR:dmp

ATTEST A TRUE COPY
RITA FULLER
CLAY COUNTY CIRCUIT CLERK
BY [illegible] D.C.

BEST AVAIL

Defendant/Respondent

(IC)

DOCKET SHEET

Circuit Court, Clay County, Missouri

File No. CR 185-491FX

Nature of Action:	State of Mo.	
	Plaintiff/Petitioner	
	vs.	Att. for Plaintiff or Petitioner
	Heath Wilkins	Sean O'Brien Cynthia Short
	Defendant/Respondent	Att. for Defendant or Responden

Date	Orders of Court
OCT 30 1998	Case; Δ in custody with Att.: O'Brien + Short + state by Asst. Pros. Atty. Wilson. Matter coming on Δ's motion to set aside guilty plea of Δ in case no. CR 185-491 & CR 185-492 & enter guilty plea in all three cases at which a hold for report Δ waives rights & elects and enters plea of guilty; all & each of which Δ files in open court; state & Δ discuss & Δ's rights explained to Δ; Court grants motion to file all motions & oral motions on or before 12/18/98. State grants Δ's request for setting out on 12/21/98 at 9:00 a.m. SAH!

ATTEST A TRUE COPY
RITA FULLER
CLAY COUNTY CIRCUIT CLERK
BY Phyllis Fairchild D.C.

ABLE COPY

DOCKET SHEET

Circuit Court, Clay County, Missouri

ONE

File No. CR185-492F X

Nature of Action:	State of Missouri	Larry Harman
Class A felony armed criminal ~~action~~ INformation	Plaintiff/Petitioner vs. Heath Wilkins AKA Pyzon	Att. for Plaintiff or Petitioner
	Defendant/Respondent	Att. for Defendant or Respondent

~~et~~ ~~or~~ ~~tmp~~ ~~o~~ ~~at~~

DOCKET SHEET

Circuit Court, Clay County, Missouri

File No. CR 185-492FX

Nature of Action:	State of Missouri	John Newberry Dan White
	Plaintiff/Petitioner vs.	Att. for Plaintiff or Petitioner
	Heath A. Wilkins PD	Cynthia Short Sean O'Brien
	Defendant/Respondent	Att. for Defendant or Respondent

Date	Orders of Court
Oct 30 1998	Comes defendant in person & with attys. O'Brien & Short and State by assistant pros. White. Court makes record on defendant's motion to set aside guilty pleas of defendant in case No. CR 185-490, CR 185-491, & CR 185-492. Court Orders guilty pleas in all three casues set aside & held for naught. Defendant waives reading of charge and enters plea of not guilty in all 3 causes of action. Defendant files in open Court motion for discovery & delivers copy to State. Court orders parties to file all notices & pre-trial motions on or before 12/18/98. Court orders parties to appear for scheduling conference on 12/21/1998 at 9:00 am. DWR:dmp

ATTEST A TRUE COPY
RITA FULLER
CLAY COUNTY CIRCUIT CLERK
BY [signature] D.C.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HEATH ALLEN WILKENS,	)	
	)	
Appellee/Petitioner,	)	
	)	
vs.	)	No. 96-2441WMKC
	)	
MICHAEL BOWERSOX,	)	
	)	
Appellant/Respondent.	)	

MOTION TO STAY ISSUANCE OF THE MANDATE

Comes now respondent, by and through counsel, and states as follows in support of his motion to stay issuance of the mandate.

On July 13, 1998, the petition for rehearing with suggestions for rehearing en banc was denied. Respondent intends to file a petition for writ of certiorari with the United State Supreme Court. Supreme Court Rule 10. Respondent believes that circumstances of this case justify a stay of mandate under Eighth Circuit Rule 41A.

Respondent bears the burden of showing that the issues to be presented to the United States Supreme Court are appropriate for its determination. Eighth Circuit Rule 41A. The standard requires reference to Supreme Court Rule 10 for the criteria the United States Supreme Court uses to decide whether to exercise its discretion to issue a writ of certiorari. Several issues may merit United States Supreme Court consideration.

The first issue is whether a knowing, intelligent, and voluntary waiver of counsel, entry of a guilty plea, and waiver of presenting mitigating evidence, requires that the trial court explain to the defendant all possible defenses to the charges against him, inform the defendant of lesser-included offenses, and advise the defendant of the full range of punishments including that for all lesser included offenses. A related issue is whether

such advice must be limited to the specific facts underlying the offense and thus, the effect of advising a defendant of a nonviable defense, or whether it is sufficient to provide the defendant with a generic, all inclusive list of defenses and possible lesser-included offenses. This has not yet been addressed by the Supreme Court. To the extent that it has been addressed in United States v. Broce, 488, U.S. 563 (1989), this Court's treatment of the issue is inconsistent.

A second issue stands out for Supreme Court review. As the court is aware, neither Faretta v. California, 422 U.S. 806 (1975) (addressing the requirements for a valid waiver of counsel to enter a valid guilty plea) nor United States v. Broce, 488 U.S. 563 (1989) (determining that a defendant need not be advised of all defenses) adopted the plurality opinion of Von Moltke v. Gillies, 332 U.S. 708 (1948), for the proposition that a valid waiver of the right to counsel or the entry of a guilty plea require that the court advise the defendant of all possible defenses to the charges against him, inform the defendant of lesser included offenses, and advise the defendant of the full range of punishments including that for all lesser included offenses.

Wherefore, for the reasons herein stated, respondent prays the court issue an order staying issuance of its mandate.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

CASSANDRA K. DOLGIN
Assistant Attorney General
Missouri Bar No. 38821

P. O. Box 899
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(573) 751-3321

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, certified via the U.S. Postal Service, on 15 July 1998, to:

Sean O'Brien
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110

CASSANDRA K. DOLGIN

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-2441WMKC

Heath Allen Wilkins,

Appellee,

vs.

Michael Bowersox,

Appellant.

Appeal from the United States District Court for the Western District of Missouri

Appellant's motion for stay of mandate pending the filing of a petition for writ of certiorari in the United States Supreme Court has been considered by the court and is denied.

September 1, 1998

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit